2798

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 256.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI AT THE RELATION AND TO THE USE OF CHRIS. GOTTLIEB, COLLECTOR OF THE REVENUE FOR JACKSON COUNTY, MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED FEBRUARY 20, 1902.

(18,423.)

27984

(18,423.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 256.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI AT THE RELATION AND TO THE USE OF CHRIS. GOTTLIEB, COLLECTOR OF THE REVENUE FOR JACKSON COUNTY, MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ	3	2
Citation and acceptance of service	4	2
Caption	5	3
Judgment of circuit court, Jackson county	5	3
Order overruling motion for new trial and allowing appeal	7	5
Certificate of clerk	8	5
Abstract of record	9	6
Petition	9	6
Answer	11	7
Stipulation as to replication	19	12
Judgment	19	12
Order overruling motion for new trial and allowing appeal	22	14
Bill of exceptions	22	14
Stipulation as to evidence	23	15
Entry from tax book	23	15
Stipulation as to facts	24	16
Deposition of Alexander A. Lesueur	25	17
Edward C. Crow	37	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1902.

	Original.	Print
Proceedings of State board of equalization	44	30
Return of property owned by Western Union Telegraph Co. on June 1, 1898	46	31
Deposition of Theodore P. Cook	48	34
Exhibit A—Tax bill	60	43
B—Tax bill	61	44
C—Tax bill	61	44
D—Statement showing cost of one mile of poles, &c	62	45
E—Invoice	63	46
F—Invoice	64	46
G—Invoice	65	47
H—Invoice	65	47
I—Invoice	65	48
J—Invoice	66	48
K—Invoice	66	48
L—Invoice	67	49
M—Invoice	67	49
N—Invoice	68	50
O—Invoice	68	50
P—Invoice	69	50
Q—Invoice	69	51
R—Invoice	70	51
S—Remarks of Mr. E. Smith before State board of equalization	70	51
Plaintiff's requests	75	54
Defendant's requests	76	56
Judgment	78	57
Plaintiff's motion for new trial	79	58
Defendant's motion for new trial	80	58
Plaintiff's affidavit for appeal	81	59
Defendant's affidavit for appeal	82	59
Bill of exceptions signed	82	60
Opinion of circuit court	83	60
Order advancing cause	89	64
Motion to advance	89	64
Cause submitted	92	66
Judgment	92	66
Opinion	93	67
Order allowing writ of error, &c.	110	78
Petition for writ of error	111	78
Assignment of errors	113	80
Bond	115	81
Clerk's certificate	117	82

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Missouri, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Missouri at the relation and to the use of Chris Gottlieb, collector of the revenue for Jackson county, Missouri, plaintiff and appellant, and The Western Union Telegraph Company, defendant and appell*ant*, wherein was drawn in question the validity of an assessment for purposes of taxation made by the State board of equalization of the State of Missouri of the property of said Western Union Telegraph Company and which assessment it was claimed by said telegraph company was of franchises granted it by the Government of the United States and non-taxable and the assessment and taxation of which was violative of the laws of the United States and the Constitution of the United States and the decision was in favor of the validity of said assessment and taxation, and wherein was drawn the question of the validity of an assessment for purposes of taxation of the property of said telegraph company which it was alleged and claimed violated the fourteenth amendment to the Constitution of the United States, for the reason that said assessment and taxation was upon the full and actual value of the property of said telegraph company, whereas other property, real and personal, in said State of Missouri, was equalized and adjusted by said State board of equalization for purposes of taxation at only 40 % of its true and actual value, and the decision was in favor of the validity of the assessment and taxation aforesaid of the property of said Western Union Tele-

2 graph Company and said decision was against the rights and privileges set up and claimed by said Western Union Telegraph Company under the laws and the Constitution of the United States a manifest error hath happened to the great damage of the said Western Union Telegraph Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date of the citation in this cause in the said Supreme Court of the United States, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of January in the year of our Lord, one thousand nine hundred and two.

Issued at office in the city of Jefferson with the seal of the circuit court of the United States for the central division of the western judicial district of Missouri, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court, Central Division, Western Judicial District of Missouri.

Allowed by—

G. D. BURGESS,
Judge and Chief Justice of the Supreme Court of the State of Missouri.

3 *Return to Writ.*

STATE OF MISSOURI, *sct:*

In obedience to the command of the within writ, I herewith transmit to Supreme Court of the United States a duly certified copy of the record and proceedings in the within-entitled case together with all things concerning the same.

Seal of the Supreme Court of Missouri.

In witness whereof, I hereto subscribe my name and affix the seal of said court at the city of Jefferson this 11th day of February A. D. 1902.

JNO. R. GREEN,
Clerk Supreme Court of Mo.

3½ [Endorsed:] No. — State *ex rel.* Gottlieb coll'r &c. app. *vs.* Western Union Tel. Co. app. Writ of error. Filed Jan. 29 1902 Jno. R. Green clerk.

4 The United States of America to the State of Missouri *ex rel.* Chris Gottlieb, collector of the revenue for Jackson county, Missouri, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington thirty (30) days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Gavon D. Burgess, chief justice and judge

of the supreme court of the State of Missouri, this 29th day of January, in the year of our Lord, one thousand nine hundred and two.

G. D. BURGESS,
Chief Justice and Judge of the Supreme Court of the State of Missouri.

Service hereby accepted.

R. E. BALL AND
H. M. MERRIWETHER,
Attorneys for Def't in Error.

5 In the Supreme Court of Missouri.

STATE OF MISSOURI, *set:*

Be it remembered, that heretofore to wit, on the 28th day of February, 1901, there was filed in the office of the clerk of the supreme court of the State of Missouri, a certified copy of the judgment and order granting appeal, in the case of State of Missouri at the relation of Chris. Gottleib, collector of the revenue for Jackson county, Missouri, against The Western Union Telegraph Company, which said certified copy of the judgment and order granting appeal is in words and figures as follows, viz:

Be it remembered that on the 10th day of the regular January term, A. D. 1901, of the circuit court of Jackson county, State of Missouri, at Kansas City, the same being the 24th day of January, A. D. 1901, the following proceedings were had and made of record in the cause entitled:

STATE *ex Rel.* CHRIS GOTTLEIB, Collector, Plaintiff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant. } 38998.

This cause came on for hearing on the 15th day of January, 1901, at this the regular January term, according to its setting on the docket. The plaintiff appears by its attorneys, Hunter M. Merriwether, and E. C. Slevin. The defendant appears by its attorneys, J. V. C. Karnes, and Elenius Smith. And the jury having been waived the cause was taken up and considered by the court, and the court having heard the evidence offered by plaintiff and defendant and the arguments of counsel for both plaintiff and defendant the cause was taken under advisement, and now on this 24th day of January, 1901, the court having considered the pleadings, evidence and arguments of counsel for both plaintiff and defendant, and it appearing to the court that the assessment in this case was made by the State board of equalization of the property of the defendant company, and that the State board assessed the following

6 property as belonging to defendant on the first day of June, 1898, and subject to taxation for the year 1899, to wit:

6075.98 miles of poles at $71.50 per mile	$434,432.57
23766.34 miles of wire at 22.02 per mile	523,356.82
2375 instruments at 5.70 each	13,537.50
All other property	856,400.56
Total assessed valuation of the entire State	$1,827,727.45

And the court finds the fact to be from the evidence and the pleadings that the defendant owned in the State of Missouri, at the time of said assessment the poles, wires and instruments of the value hereinbefore set forth.

And the court finds the fact to be from the evidence that in valuing "all other property" of defendant the State board took into consideration the franchise of defendant company, and the court finds under the law, and so declares, that the franchise of defendant company is not subject to valuation and taxation and as to this item of the above-named valuation the court finds the issues for the defendant. It is therefore considered, ordered and adjudged by the court that the plaintiff recover of the defendant for its taxes for the year 1899 upon the assessment as made by the State board of equalization against the poles, wires and instruments of the defendant as above set forth. The items of said tax on the apportionment for the county of Jackson being the following amounts.

For State purposes	$117.40
For county purposes	164.37
For road purposes	20.54
For general county school purposes	214.95
For school-building purposes	1.74
For other school purposes	11.04
For Kansas City municipal purposes	57.13
For Independence municipal purposes	14.72
For Kaw township railroad purposes	1.18
For Blue township railroad purposes	2.75
7 Total	$605.82

together with interest upon the total amount so found to be due from the defendant at the rate of one per cent. per month from the first day of January, 1900, to date, amounting to $—. And also for two per cent. of the gross sum found to be due from defendant for the commissions of the collector of the revenue; and also a reasonable fee for the attorneys of the plaintiff, to be hereafter determined by the court and taxed as costs against the defendant.

It is further found by the court that the gross sum due from the defendant is a first lien against the property of the defendant in the county of Jackson and State of Missouri, and it is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the amount as above mentioned for its taxes for the year 1899, and for costs and interest thereon and that special execution issue to be levied out of the property of the defendant as above set forth.

Thereupon defendant files motion for a new trial of this cause and plaintiff also files motion for a new trial of this cause.

During the January term A. D. 1901, the same being the 26th day of January A. D. 1901, the following proceedings were had and made of record in the cause entitled:—

STATE OF MISSOURI *ex Rel.* CHRIS. GOTTLEIB, Collector,
v.
WESTERN UNION TELEGRAPH COMPANY. } 38998.

Now the motion of plaintiff for a new trial in this cause is by the court overruled. To which action of the court plaintiff excepts. Thereupon said plaintiff files affidavit for appeal herein, and the court allows said plaintiff — from the judgment of this court in this cause to the supreme court of the State of Missouri.

Whereupon the motion of defendant for a new trial in this cause is by the court overruled. To which action of the court the said defendant excepts.

8 Said defendant files its affidavit for appeal herein, said affidavit being made by J. V. C. Karnes, one of defendant's attorneys, and said defendant also files its appeal bond herein in the penal sum of $1500.00, with J. V. C. Karnes, and Edwin A. Krauthoff, sureties thereon, which bond is by the court approved. Thereupon the court allows said defendant an appeal from the judgment of this court in this cause to the supreme court of the State of Missouri.

STATE OF MISSOURI, } *ss:*
County of Jackson,

I, H. M. Stonestreet, clerk of the circuit court of Jackson county, State of Missouri, do hereby certify that the foregoing is a full, true and complete copy of judgment and order allowing appeal in the cause wherein State *ex rel.* Chris Gottleib is plaintiff, and Western Union Telegraph Company, is defendant, as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at office in Kansas City, Missouri, this 23rd day of February, A. D. 1901.

H. M. STONESTREET, *Clerk,*
By D. M. McCLANAHAN, *D. C.*

And afterwards to wit, on the 15th day of March, 1901, there was filed in the office of said clerk, the following abstract of record, which said abstract of record is in words and figures as follows, viz:

9 In the Supreme Court of Missouri, April Term, 1901.

STATE OF MISSOURI *ex Rel.* CHRIS GOTTLEIB, Collector, Appellant,
vs.
WESTERN UNION TELEGRAPH COMPANY, Appell*ant*.

Abstract of Record.

The petition in this case is as follows:

State of Missouri, suing at the relation and to the use of the collector of the revenue within and for the county of Jackson, alleges that Chris Gottleib is the legally qualified and acting collector of the revenue within and for the county and State aforesaid; that defendant is a corporation organized and existing according to law; that on the first day of June, A. D. 1898, defendant was, and ever since has continued to be, the owner and in control of the following-described telegraph property, to wit:

A certain system or line of telegraph wires and poles maintained and operated for transferring messages and general telegraph matter from a point or points in Kansas City, Missouri, to various points throughout the United States, the head office of said Western Union Telegraph Company in Kansas City, Missouri, being now located at the southwest corner of Seventh and Main streets, in Kansas City, Missouri; that the total valuation of said telegraph property, as assessed and equalized by the State board of assessment and equalization of railroad and telegraph property and apportioned to Jackson county for taxation, for the year 1899, was $80,972.80; that all of said property was then and there subject to taxation for State, county, school, and other purposes for the year 1899; that there was legally assessed and levied against said property for said year,
10 for State, county, school and other municipal purposes, the aggregate sum of $1,027.22; that of the taxes so assessed and levied, there is now due and unpaid

For State purposes	$202.43
For county purposes	283.40
For road purposes	35.41
For general county-school purposes	370.61
For school-building purposes	2.98
For school other purposes	19.03
For Kansas City municipal purposes	81.21
For Independence municipal purposes	25.38
For Kaw township railroad purposes	2.03
For Blue township railroad purposes	4.74
Total	$1,027.22

Which said sums the defendant has failed to pay as required by law.

That plaintiff is entitled to recover of defendant a penalty of 1 per cent. per month, on the amount due and unpaid, for the year

1899, from the first day of January, 1900, until the same shall be paid.

Plaintiff further states that the taxes so assessed and levied, are, by virtue of the laws of this State, a first lien on the telegraph property, wires and poles and telegraph instruments of the defendant.

Wherefore plaintiff prays judgment for the sum of $1,027.22, and penalty thereon, until the same shall be paid, and for reasonable attorneys' fees and for collector's commissions and for costs of this suit, and that the same be declared a lien of the State of Missouri and that said lien be enforced and said telegraph property, franchises, poles, wires, and instruments, or so much thereof as may be necessary, be sold to satisfy said judgment and costs, and that a special *fieri facias* be issued thereon against said property.

11 To which defendant filed the following

Answer.

1. Now comes The Western Union Telegraph Company, defendant in the above-entitled cause, and for answer to the petition in said cause, admits that Chris Gottleib is and was at all of the times in said petition mentioned the legally qualified and acting collector of the revenue within and for the county of Jackson and State of Missouri, and admits that defendant is and was at the times in said petition mentioned a corporation organized and existing according to law.

Admits, as in said petition alleged, defendant was and still is the owner and in control of certain telegraph property, and admits said property was assessed and equalized by the State board of equalization for the year 1899, at the sum of $80,972.80, and admits that the property aforesaid by it owned and located in said county of Jackson was subject to taxation for State, county, school and other purposes for the year 1899, but denies that there was legally assessed and levied against said property for said year the amount of taxes for the respective purposes in said petition set forth.

Admits that it has failed to pay the taxes in said petition set forth, but denies that plaintiff is entitled to recover said taxes and the penalty thereon as alleged in said petition, and denies that said taxes were levied or assessed in such manner as to constitute a prior or other lien as alleged in said petition on the property of defendant.

Wherefore, having fully answered, defendant prays to be hence dismissed with costs.

2. And for another and separate defense to the cause of action in plaintiff's petition set forth, defendant avers that, to wit, in the month of January, 1899, it caused to be presented to the State board of equalization of the State of Missouri a return duly sworn

12 to by the superintendent of defendant of all of the property owned by the defendant in the State of Missouri on the first day of June, 1898, for the purposes of taxation for the year 1899, and said return, among other things, showed that defendant owned in the said county of Jackson and State of Missouri on the said first day of

June, 1898, 168.47 miles of poles of the fair valuation of fifty dollars per mile, or the aggregate sum of $8,423.50, and on said last-mentioned date owned in the county of Jackson 1052.95 miles of wire, which said wire and all instruments and batteries used by defendant in its business of telegraphing were of the fair valuation of ten dollars per mile of wire, making an aggregate of $10,529.50. And so defendant avers that on, to wit, the said first day of June, 1898, all of its property of every kind and character in the said county of Jackson, except as hereinafter mentioned, subject to taxation under the laws of the State of Missouri, was of the fair aggregate valuation of $18,953. Defendant avers that on the said first day of June, 1898, the total of its property other than poles, wires, instruments and batteries in the said county of Jackson, and being property of the character of furniture, fixtures, horse and wagon and tools, did not exceed the fair aggregate valuation of one thousand dollars, and which property last aforesaid was in due form of law returned by defendant company for assessment and taxation for State and other purposes, and was by the proper local authorities of said Jackson county duly assessed at said sum of $1,000, and the taxes upon which assessment have been paid by defendant.

Defendant avers that, as required by law, said State board of equalization did thereafter proceed to adjust and equalize the valuation of real and personal property among the several counties in the State of Missouri, and did, among other things, proceed to determine the valuation of all property in the State of Missouri owned by this defendant on the first day of June, 1898. Defendant avers
13 that at said hearing it offered, through its agents and attorneys, to prove to the satisfaction of said State board of equalization that the fair aggregate value of all of defendant's property in the said State of Missouri on said first day of June, 1898, subject to taxation, was, as shown by the return, as aforesaid, made by defendant, the sum of $541,472.40, a copy of which said return is herewith filed and marked Exhibit "A." That said State board of equalization, ignoring the sworn return so made as aforesaid, by this defendant, and of the offer of defendant by competent testimony to establish the truthfulness of said return, did thereafter proceed to fix a valuation of the property of this defendant in the said State of Missouri on the first day of June, 1898, for the purposes of taxation as aforesaid, and to distribute such aggregate valuation among the counties and certain cities and towns in the State of Missouri, as required by law, and that the said State board of equalization did place upon the 6075.98 miles of poles, which defendant admits it then had in said State of Missouri, a valuation of $71.50 per mile, or an aggregate valuation of $434,432.57. That said State board of equalization did then place a valuation on the 23,767.34 miles of wire, which defendant admits it then had in the State of Missouri, at $22.02 per mile, or an aggregate of $523,356.82, and did then place upon 2,375 instruments, which it admits it then had in the State of Missouri, a valuation of $5.70 each, or an aggregate valuation of $13,537.50, and did then and there further place upon what it, said State board of equalization, did then and there designate as

"all other property" an aggregate valuation of $856,400.56, making a total valuation upon the property of this defendant as fixed by said State board of equalization as of said June 1, 1898, for purposes of taxation for the year 1899, of $1,827,727.45.

Defendant avers that said valuation so as aforesaid placed upon said property by said State board of equalization as to said poles, wires and instruments was grossly excessive, and that for the amounts so fixed respectively by said State board of equal-
14 ization defendant could on said June 1, 1898, as well as at the time said valuations were in fact fixed by said State board of equalization, have constructed and erected an entirely new system of poles, wires and instruments of the exact mileage and character of the poles, wires and instruments designated in the return of this defendant and in the assessment so made by the State board of equalization. And so defendant avers that said State board of equalization deliberately and intentionally ignored the fact that the system of poles, wires and instruments hereinbefore referred to were not new, but in various stages of deterioration and decay, and further ignored the fact that for the valuation so as aforesaid by them fixed an entirely new system of poles, wires and instruments of the mileage and character aforesaid could have been by this defendant constructed.

Defendant avers that said State board of equalization, with a full knowledge of the values of said poles, wires and instruments and with intent to injure this defendant by compelling it to pay an excessive and disproportionate share of State and local taxes, discriminated against this defendant, well knowing at the time that they were so doing, and so as aforesaid assessed the poles, wires and instruments of this defendant at far more than their true and actual value.

Defendant avers that under the law it was the duty of said board of equalization to adjust and equalize as aforesaid the valuation of all real and personal property in the State of Missouri, among the several counties in the State, and that during the period aforesaid it did so proceed to adjust and equalize such valuations. That said State board of equalization, by common arrangement, understanding and purpose among themselves, in fact did during the period aforesaid, in violation of the constitution and laws of said State of Missouri, with intent to compel defendant to pay a greater proportion of taxes than the owners of other real and personal property in
15 said State of Missouri, assess all property, to wit, other than the property of telegraph companies, at, to wit, from thirty-five to forty per cent. of its true value, whereby as to taxes levied upon real and personal property other than telegraph property in the State of Missouri this defendant was unlawfully and wrongfully discriminated against to the extent of sixty per cent. of the amount of taxes assessed by said State board of equalization and levied by the taxing officers of the State upon defendant in pursuance of such assessment.

Defendant avers that, to wit, on the said first day of June, 1898, it had no property in the State of Missouri subject to taxation, other than the poles, wires, and instruments aforesaid, excepting certain

furniture, fixtures, horses and wagons and property of like character, the aggregate market valuation of which did not on said day exceed the sum of five thousand dollars. That almost all of the property of the character last aforesaid was located in the cities of St. Louis, Kansas City, and St. Joseph in the State of Missouri, and was duly returned by defendant to the proper taxing and revenue officers of said cities respectively; that, to wit, the sum of $3,580.00 for said city of St. Louis, the sum of $1,000.00 for said city of Kansas City, and the sum of $50.00 for said city of St. Joseph, all for taxation for the year 1899, and the taxes duly assessed by the officers aforesaid have been paid by this defendant, and defendant avers that all of its other property in the State of Missouri of the character aforesaid outside of the three cities aforesaid is of less value than, to wit, the sum of $500.00. Defendant avers that in fact said State board of equalization, in assessing "all other property" of defendant at said sum of $856,400.56, did intend to and in fact assess the franchises of this company, and that the sum last aforesaid was intended to be and in fact was the valuation placed by said State board of equalization upon the franchises of defendant exercised in the State of Missouri.

16 Defendant avers that said State board of equalization, knowing that it had no power to assess the franchises of this defendant, did, for the purpose of concealing the truth with respect to the assessment of said franchises, designate the same as "all other property." Defendant avers that neither on said first day of June, 1898, nor prior nor subsequent thereto did it exercise or have any franchises in the State of Missouri in pursuance of grant from said State of Missouri or any municipal or territorial division thereof, but that all of its franchises of every kind and character are derived from the State of New York, in which said State said defendant was incorporated, and from the United States, and that all of the franchises by it exercised in said State of Missouri as aforesaid are exercised in pursuance of grants from the United States and from no other source. And so defendant avers that the attempt by said State board of equalization to assess the said franchises of defendant is illegal and in contravention of the Constitution and laws of the United States. Defendant further avers that the said State board of equalization, pursuant to law, did certify to the counties of the State of Missouri, including the county of Jackson, their respective shares and proportions or the aggregate assessment of $1,827,727.45 so as aforesaid illegally fixed by said State board, and that the amount so as aforesaid certified to the said Jackson county is as in said petition alleged.

Wherefore, having fully answered, defendant prays to be hence dismissed with costs.

3. And for another and further defense to the cause of action in said petition set forth, defendant avers that it is now, and before, and on, and since the twenty-fourth day of July, 1866, was and has been, a corporation chartered, created and organized in the State of New York, under the laws of the said State of New York, and that defendant owns, controls, or uses lines of telegraph in various parts of the United States and in the said county of Jackson, and con-

structed and maintained as hereinafter more particularly set
17 forth in the said county of Jackson and throughout the State of Missouri, over and along the post-roads of the said United States which have been declared to be such by law, and over, under and across navigable streams and waters of the United States adjoining and in the State of Missouri, to wit, the Mississippi and Missouri rivers; that on, to wit, the fifth day of June, in the year 1867, defendant duly accepted and thereafter, to wit, on the twelfth day of June, in said last-mentioned year, duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations required by law under and in accordance with the act of Congress of the United States of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes." Defendant avers that upon said filing it became entitled to and had and hath ever since had the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States, and by and under said act and acceptance and filing the said company became and hath ever since been bound and obliged to give priority over all other business to telegrams between the several departments of the Government of the United States and their officers and agents in their transmission over the lines of the said defendant, at such rates as the said Postmaster General has annually fixed or shall annually fix, and to sell all its telegraph lines, property and effects to the said United States at an appraised value to be ascertained by five competent, disinterested persons, two of whom shall be selected by said Postmaster General, two by defendant, and one by the four previously elected, and also liable to a penalty of not less than one hundred or more than one thousand dollars for each refusal or neglect to transmit any such telegraphic communications as are pro-
18 vided for by the aforesaid act or by title LXV of the Revised Statutes of the United States, or by the provisions of section 221 of said Revised Statutes, title "The Department of War," authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and force of storms.

Defendant avers that its lines of telegraph aforesaid extend to and from the said county of Jackson and State of Missouri into and through most of the States and Territories of the United States and to the city of Washington, in the District of Columbia, and connect with those owned and established by the Government of the United States for public purposes, and that defendant is in close communication with other telegraph companies doing business in the said United States and other countries; and so defendant avers that the lines of telegraph erected and maintained by it in the said county of Jackson and State of Missouri, were so erected and have been and are maintained in pursuance of and subject to the provisions of the

laws of the United States aforesaid, and that it has submitted to and accepted the conditions aforesaid imposed by said laws, and has declared its purpose and desire to avail itself of the privileges granted by said laws aforesaid.

That since the filing of the written acceptance aforesaid, defendant has transacted its business in the State of Missouri, and does continually and constantly transmit from, into and through the said county of Jackson telegrams between departments of the Government of the United States and the officers and agents thereof at rates as aforesaid fixed by said Postmaster General, and for and between other persons residing in the different States of the United States and in foreign countries and over its lines maintained on and along said post-roads and over other lines of telegraph connected with
19 the lines of defendant in and through other parts and States of said United States and thereby became and was prior to the said year 1898 and at all times since has been an instrument of foreign and interstate commerce and a Government agent for the transmission of Government business and of messages between points in the said State of Missouri and points in other States and foreign countries. Defendant avers that all of the franchises by it exercised in the State of Missouri, prior to the said — 1898 and ever since have been exercised in pursuance of the rights granted to it as aforesaid by the act of Congress aforesaid and the Constitution and laws of the United States, and that no right, privilege or franchise of any kind or character has even been gra-ted to it by the said State of Missouri.

Defendant avers that the assessment, so as aforesaid made by the State board of equalization against this defendant, of the sum of $856,400.56, so as aforesaid purporting to be on account of "all other property" of defendant in the State of Missouri, is, in fact, an assessment for purposes of taxation solely on account of the franchises granted the defendant by the Constitution and laws of the United States, and defendant avers that the said State of Missouri is and was without power or authority to tax such franchises, and that the assessment last aforesaid so made by said State board of equalization is illegal and void.

Wherefore, having fully answered, defendant prays to be hence dismissed with costs.

At the trial of the case it was stipulated the same might proceed the same as if a replication had been filed denying the new matter set up in the answer. The case was tried at the January term of the circuit court of Jackson county, Missouri, the same being the 24th day of January, 1901, and there was entered of record on said day the following judgment:

This cause came on for hearing on the fifteenth day of January, 1901, at this the regular January term, according to its setting on the docket. The plaintiff appears by its attorneys, Hunter M. Meri-
20 wether and E. C. Slevin; the defendant appears by its attorneys, J. V. C. Karnes and Elenelous Smith. And a jury having been waived, the cause was taken and considered by the court,

and the court having heard the evidence offered by plaintiff and defendant and the arguments of counsel for both plaintiff and defendant the cause was taken under advisement, and now on this twenty-fourth day of January, 1901, the court having considered the pleadings, evidence and arguments of counsel for both plaintiff and defendant, and it appearing to the court that the assessment in this case was made by the State board of equalization of the property of the defendant company, and that the State board assessed the following property as belonging to defendant on the first day of June, 1898, and subject to taxation for the year 1899, to wit:

6,075.98 miles of poles at $71.50 per mile	$434,432.57
23,766.34 miles of wires at $22.02 per mile	523,356.82
2,375 instruments at $5.70 each	13,537.50
All other property	856,400.56
Total assessed valuation of the entire State	$1,827,727.45

And the court finds the fact to be from the evidence and the pleadings that the defendant owned in the State of Missouri, at the time of said assessment, the poles, wires and instruments of the value hereinbefore set forth.

And the court finds the fact to be from the evidence that in valuing "all other property" of defendant the State board took into consideration the franchise of defendant company, and the court finds under the law, and so declares, that the franchise of defendant company is not subject to valuation and taxation, and as to this item of the above-named valuation the court finds the issues for the defendant.

It is therefore considered, ordered and adjudged by the court that the plaintiff recover of the defendant for its taxes for the year 1899 upon the assessment as made by the State board of equaliza-
21 tion against the poles, wires and instruments of the defendant as above set forth. The items of said tax on the apportionment for the county of Jackson being the following amounts:

For State purposes	$117.40
For county purposes	164.37
For road purposes	20.54
For general county-school purposes	214.95
For school-building purposes	1.74
For other school purposes	11.04
For Kansas City municipal purposes	57.13
For Independence municipal purposes	14.72
For Kaw township railroad purposes	1.18
For Blue township railroad purposes	2.75
Total	$605.82

Together with interest upon the total amount so found to be due from the defendant at the rate one per cent. per month from the first day of January, 1900, to date, amounting to $—. And also for two per cent. of the gross sum found to be due from defendant for the

commissions of the collector of the revenue; and also a reasonable fee for the attorneys of the plaintiff, to be hereafter determined by the court and taxed as costs against the defendant.

It is further found by the court that the gross sum due from the defendant is a first lien against the property of the defendant in the county of Jackson and State of Missouri, and it is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the amount as above mentioned for its taxes for the year 1899, and for costs and interest thereon, and that special execution issue to be levied out of the property of the defendant as above set forth.

Thereupon defendant files motion for a new trial of this cause, and plaintiff also filed motion for a new trial of this cause.

During the January term, A. D. 1901, the same being the
22 twenty-sixth day of January, A. D. 1901, the following proceedings were had and made of record:

Now the motion of plaintiff for a new trial in this cause is by the court overruled. To which action of the court, plaintiff excepts. Thereupon said plaintiff files affidavit for appeal herein, and the court allows said plaintiff — from the judgment of this court in this cause to the supreme court of the State of Missouri.

Whereupon the motion of defendant for a new trial in this cause is by the court overruled. To which action of the court, the said defendant excepts. Said defendant files its affidavit for appeal herein, said affidavit being made by J. V. C. Karnes, one of the defendant's attorneys, and said defendant also files its appeal bond herein in the penal sum of $1500.00, with J. V. C. Karnes and Edwin A. Krauthoff, sureties thereon, which bond is by the court approved. Thereupon the court allows said defendant an appeal from the judgment of this court in this cause to the supreme court of the State of Missouri.

Thereafter at said January term, 1901, and on the twenty-third day of February, 1901, there was filed of record in said cause a bill of exceptions signed and sealed by the Honorable John W. Henry, before whom said cause was tried, said bill of exceptions being in words and figures as follows, to wit:

Bill of Exceptions.

Be it remembered, that on the fifteenth day of January, 1901, and at said January term, 1901, of said circuit court, the above-entitled cause coming on to be heard before the Honorable John W. Henry, judge of said court, the plaintiff appearing by its attorneys, H. M. Meriwether and Eugene C. Slevin, and the defendant appearing by its attorneys, Dickson & Smith and Karnes, New & Krauthoff, the following proceedings were had:

It was agreed between counsel that the case may proceed as if the formal reply denying the new matter set up in the answer
23 had been filed:

The plaintiff to sustain the issues upon its behalf then offered evidence as follows:

Mr. MEREIWETHER: I offer in evidence a stipulation with regard to the evidence.

Said stipulation is as follows:

In the Circuit Court of Jackson County, Missouri, at Kansas City, January Term, 1901.

STATE OF MISSOURI *ex Rel.* and to the Use of CHRIS GOTTLEIB, Plaintiff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant.

It is agreed that the tax book for the year 1899, designated as railroad tax book offered in evidence by plaintiff shall be *prima facie* evidence of the validity of the taxes thereon assessed for the year 1899, against defendant, Western Union Telegraph Company, without proof by plaintiff of any of the steps leading up to its execution and issuance, but nothing herein shall be taken as precluding defendant from introducing any competent and relevant evidence to sustain the issues on its behalf.

H. M. MERIWETHER,
Attorney for Plaintiff.
DICKSON & SMITH,
KARNES, NEW & KRAUTHOFF,
For Defendant.

Mr. MEREIWETHER: I now introduce the railroad tax book for the year 1899, showing the taxes against the Western Union Telegraph Company, on page 3677.

The entry offered is as follows:

Valuation, $80,972.80: apportionment to Independence, $3,383,63; apportionment to Kansas City, $6,767.27; county tax, $283.40; road tax, $35.41; county-school tax, $370.61; building school
24 tax, $2.98; other purposes school tax, $19.03; Kaw township railroad tax, $2.03; Blue township railroad tax, $4.74; Kansas City municipal tax, $81.21; Independence municipal tax, $25.38. Total tax, $1,027.22.

It was admitted by counsel that the tax book was certified.

The plaintiff here rested its case.

And thereupon the defendant, to sustain the issues upon its part, offered evidence as follows:

Mr. SMITH: We first offer, if your honor please, the following stipulation between counsel:

Said stipulation is as follows:

In the Circuit Court of Jackson County, at Kansas City, Missouri.

STATE OF MISSOURI *ex Rel.* and to the Use of CHRIS GOTTLEIB, Collector of the Revenue, Plaintiff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant.

For the purpose of the trial of the above-entitled cause, the following facts are admitted, but objections to the admission of such facts in evidence on the ground of incompetency, irrelevancy or immateriality or any other proper objection in law may be made at the trial.

First. It is admitted that defendant is now, and at the times mentioned in the petition in said cause was, and ever since the year 1854 has been a corporation, organized and existing under the laws of the State of New York.

Second. The defendant on, to wit, the 5th day of June, 1867, duly accepted and on, to wit, the 8th day of June, 1867, duly filed its acceptance with the Postmaster General of the United States of the provisions, restrictions and obligations required by law under and in accordance with the act of the Congress of the United States approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and that said acceptance has not been withdrawn, and that said company transmits telegrams for the Government between its departments and officers at rates annually fixed by the Postmaster General of the United States.

Third. It is admitted that defendant is not incorporated under the laws of the State of Missouri and has never applied for or secured from the State of Missouri a license authorizing it to do business within the State of Missouri, under the laws of said State.

H. M. MERIWETHER,
Attorney for Plaintiff.
KARNES, NEW & KRAUTHOFF,
DICKSON & SMITH,
Attorneys for Defendant.

Mr. MERIWETHER: We object to the second and third paragraphs mentioned in the agreed statement, on the ground that the same are irrelevant and immaterial.

The objection was overruled by the court; to which ruling of the court the plaintiff at the time duly excepted.

Mr. MERIWETHER: We object to any testimony by the defendant under the answer, for the reason that under the pleadings and the admitted facts, the plaintiff is entitled to a judgment, and for the reason that the facts sought to be proved by the defendant are incompetent, irrelevant and immaterial to the issues of this case, and for the reason that the finding and assessment by the State board of equalization is final and not subject to attack in this suit. That

objection applies to all the testimony that may be offered on behalf of the Western Union Telegraph Company.

Said objection was overruled by the court; to which ruling of the court the plaintiff at the time duly excepted.

Defendant offered and read in evidence the deposition of ALEXANDER A. LESUEUR, in the words and figures following:

26 In the Circuit Court of the City of St. Louis.

THE STATE OF MISSOURI *ex Rel.* CHARLES F. WENNEKER, Collector of the City of St. Louis, in the State of Missouri, Plaintiff,

vs.

WESTERN UNION TELEGRAPH COMPANY, Defendant.

It is hereby stipulated and agreed by and between the parties in the above-entitled cause that the deposition of Alexander A. Lesueur, a witness on behalf of the defendant, may be taken at the office of said Alexander A. Lesueur in the city of Kansas City, Missouri, on the 21st day of June, A. D. 1900, notice being hereby waived, and said deposition when taken, subject to the objections that may be made, may be read with the same force and effect in behalf of the defendant as if taken on full notice. And this deposition may be used as if taken originally in the case of State *ex rel.* Gottleib *vs.* Western Union Teleg'aph Co.

H. M. MERIWETHER,
Attorney for State ex Rel. Gottleib.
KARNES, NEW & KRAUTHOFF,
DICKSON & SMITH, *For Defendant.*

Appearances.

E. C. Slevin for plaintiff.
Elenelous Smith for defendant.

ALEXANDER A. LESUEUR, of lawful age, being produced, sworn and examined, on the part of the defendant, deposes and says:

Direct examination by Mr. ELENEIOUS SMITH:

Q. Captain, will you please state your full name?
A. Alexander A. Lesueur.
Q. And you now hold what office in the State of Missouri?
A. Secretary of state.
27 Q. How long have you held the office of secretary of state of the State of Missouri?
A. Eleven years the seventh of last January.
Q. As I understand it, Captain, there are really two State boards of equalization, are there not?
A. There are.
Q. One being constitutional and the other statutory?

A. One of the boards is a board to equalize the value of real and personal property.

Q. Throughout the State?

A. Throughout the State. And the other board is the original board of assessment to pass on railroad, telegraph and railroad-bridge properties.

Q. And the only properties that fall within the jurisdiction of the latter board are those you have mentioned?

A. Yes, sir.

Q. In the case of railroad, bridge and telegraph properties it is the duty of your board, is it not, to ascertain the character and quantity of property and fix its value, or, in other words, in that instance you assess the taxes?

A. Yes, sir; we make an original assessment of the valuation of the property.

Q. And you- associates on the board during the eleven years that you have held the office of secretary of state have been the governor, treasurer, auditor and attorney general, have they not?

A. Yes, sir.

Q. Captain, you are familiar in a general way with the returns that have been made from time to time annually, if I remember rightly, by the telegraph companies and particularly the Western Union, are you not?

A. In a general way, yes, sir.

Q. I mean you recollect the fact——

A. I recollect the character of the returns.

Q. When returns have been made?

A. Yes, sir.

Q. I will ask you if you were a member of the board and participated in the assessment of taxes upon the property of the Western Union Telegraph Company in Missouri for the year 1899 upon the return that was made in January, 1899, of the property in existence as of June 1st, 1898?

28 A. I participated in the assessment of the property of the Western Union Telegraph Company in the sessions of the board of 1899. I cannot state of my own knowledge when the annual return was prepared and submitted, but I have in my hand a certified copy of it which seems to show that it was subscribed and sworn to on the 16th day of January, 1899, and filed with the State auditor on the 17th day of January, 1899.

Q. Captain, I will hand you a paper, which for identification the notary will mark Exhibit "A," which purports to be a certified copy of the record of the State board of equalization with respect to the taxation of the Western Union Telegraph Company for 1899, and ask you to examine it and see whether or not you can recollect in a general way its contents.

The paper above referred to is here handed to the notary and marked Exhibit "A."

Exhibit "A" is here handed to the witness, who examines same.

A. I do.

Q. Captain, in this copy we find that a certain number of miles of poles and a certain number of miles of wire and a certain number of instruments are specifically assessed, and, of course, these classes of property identify themselves, but at the end there is this item, "All other property at $856,400.56." Are you able to tell us the character of the property that falls within that term, "all other property," and if so will you please do it?

A. My reply to that question would be that any individual view I might have regarding it would be of no particular value. The assessment would have to stand upon the language used by the board itself. This language was in the following words: "And considering the cost of construction and equipment of said Western Union Telegraph Company and the location thereof and its traffic and business and the market and par value of its stocks and bonds and the gross receipts and net earnings and franchises owned by said company and the value thereof, and having received
29 evidence concerning the value of the cost of construction of said telegraph line and the market value and par value of the stocks and bonds and of the gross receipts and net earning power and the franchises and value thereof, and having heard evidence upon and considered all other matter ascertainable by said board bearing upon the question of the value of said company (it should have been the value of the property, but I read it the way it is), which in the opinion of the board we assess in its findings, conclusions and judgment in arriving at actual cash value of the property of said telegraph company," etc. This would indicate therefore that a certain sum of assessment per mile was made on poles, a certain sum per mile was made on wire, a certain sum was made upon the instruments, and that the remainder, $856,400.56 was laid upon the other characters of property designated by the board in its order.

Q. Captain, is it, or is it not, a fact that the other characters of property, which you have read very fully as set forth in the official return, consisted of cost of construction and equipment, traffic and business, market and par value of stocks and bonds, gross receipts and net earnings and franchises, and that this last item is, in fact, intended to cover a taxation on what the board believed to be the proportion of franchises of the company applicable, if that is a proper term to use, to Missouri? Is that not the real fact as it was before the board?

A. I think my answer to the previous question covers this one. I can only reply to this interrogatory by repeating what I said then.

Q. Well, Captain, you do say that irrespective of your individual opinion, laying that aside, you would be bound, as of course you are, by the official record of your board, but this phrase "all other property" of course is in itself meaningless, I mean it is generic, and I would like to ask you the square question as to whether before the board it was not understood that the item intended to be covered by the $856,400.56 was not in fact franchises as applicable

to Missouri, and did you not take the position that it should have been so designated?

30 A. I can only reiterate what I have stated before, that the action of the board is concluded by its own declaration on that subject.

Q. Well, let me put it this way: The board in its official record states that franchises were considered. Now, am I right in saying that franchises constituted an element in the phrase "all other property"?

A. I think you have to judge that by the language of the board itself.

Q. Well, as a matter of fact, irrespective of the official language that was used, was not that an element, no matter how many other elements there might be, that was considered in making that valuation and fixing that assessment?

A. The board having chosen to set out in plain language the elements that were considered in making the assessment, no individual member of that board can add to or subtract from its own declaration in this regard.

Q. Well, I grant you that, but I don't wish to do either of those, but I simply ask you if, as a matter of fact and as declared by the board, if I read it rightly, franchises were not considered and embraced in that item?

A. The best evidence on that point is the record of the board itself.

Q. You have no objection to giving me your understanding of this record on this question?

A. I prefer not to give any individual views in the matter.

Q. Well, Captain, if franchises were considered and taxed, can you give us the proportion of these gross items that were figured up? We have no record to show that?

A. I can't state.

Q. Captain, can you mention as a matter of recollection any tangible property, by which I mean horses, or lands, or houses, or furniture, or anything of that kind that the board considered under the head of "all other property" and excluding, of course, wires, poles and instruments because they are specifically stated, but any tangible property that fell within the designation of "all other property"?

A. Well, I think that is answered by the record of the board.

31 Q. I am asking you now as a matter of your own recollection which, as a matter of fact, is not answered by this, because this don't refer on its face or otherwise to any corporeal property.

A. Well, I think it is answered by the record of the board, because they state what they assess. They state that they assessed certain tangible and visible property and certain other property which they define in their record.

Q. Well, that is true, but the tangible property that they do assess is, so far as I read the board's returns, specifically mentioned. Now, my question is, do you know of any tangible or corporeal property

other than the poles, wires and instruments that the board considered under this head of "all other property"?

A. I don't know that I do, but I wouldn't like to answer the question at this distance and with the multitude of items that were submitted to that board in a positive way.

Q. Well, it is true, is it not, as recited in the record of the board, that in fixing this valuation the traffic and business of the company, the market and par value of its stocks and bonds and gross receipts and net earnings and franchises were considered?

A. Those things that were mentioned in the record of the board as being considered were considered.

Q. And I am right in saying, am I, in connection with that record, that the figures that you reached here were the result of that consideration?

A. Unquestionably.

Q. Then I again ask, am I not right in picking out the one element of franchises and saying that that was considered, no matter what sort of franchise it was, that that was considered and entered into the assessment?

A. That is stated in the record.

Q. And it is a fact?

A. It is a fact that it was considered as one of the elements.

Q. And, Captain, you are not able, are you, to say how much of these figures, and I presume if franchises figured in this as-
32 sessment they would fall under the last item, "all other property," because it is neither poles, wires, nor instruments, are you able to say what proportion of the last item franchises would be, and if you cannot give a proportion, can you even in a general way state whether it was a large portion or a small portion of it?

A. I cannot answer that question, for the reason that the conclusion arrived at by each gentleman was held in his own breast.

Q. Well, but have you any objection to giving us your individual conclusion and letting us get those of the other members of the board and striking a fair average?

A. I prefer not to do that, for two reasons: First, that it is impracticable for me to give an answer that would have any value by reason of the fact that I cannot state how the other members arrived at their conclusion, and at this distance from the transaction it is impracticable for me to give an accurate estimate of how I formed my own conclusion. This in view of the fact that a great multitude of testimony in regard to railroads, railroad bridges and telegraph companies had at the time to be digested.

Q. Well, then, Captain, not being able to give either in figures or what proportion the amount at which franchises if this company were assessed, you do, however, know, as the record recites, that they were assessed at something and entered into this final figure that I have mentioned?

A. That was stated in the record.

Q. And that is a fact, is it not?

A. I assume that it is.

Q. I mean you, yourself, voted on some assessment of franchises did you not? I ask for your individual action?

A. I considered all those things that are stated in the record.

Q. Yes, sir; and then you did consider franchises?

A. That is one of the things stated in the record.

Q. Captain, I will ask you if you are familiar with the rule that has prevailed, if there has been one in our State, for many years, and particularly the eleven years that you have held the
33 office of secretary of state, with regard to the assessment of real and personal property throughout the State?

A. I think so.

Q. I mean its general assessment.

A. I think so.

Q. Captain, I will ask you if you are familiar with the rule existing in the State of Missouri with respect to the average proportion of actual value of real and personal property adopted by the assessing office as assessable value of such property for taxation purposes?

A. I am familiar with the practice.

Q. Well, that is what I want, practice or general custom.

A. The first question that you asked me was as to a rule and I can hardly answer that affirmatively, for the reason that there are several. The practice has grown up in Missouri for many years on the part of the assessors to return for assessment a portion only of the values of real and personal property. The practice of the State boards of equalization has been to equalize these various valuations as between counties. It might appear on the face of this proceeding that the State board was not literally complying with the law which requires assessments to be at real cash value. The boards have endeavored to remedy this defect, which they considered an evil and in the way of true equalization, but without success. One important reason for failure being its inability at the proper time to secure from the General Assembly such reduction of levy which accompanied with a doubling of the assessment would have procured only sufficient revenue for the economical administration of State government. It followed in a general way that properties which were subsequently assessed by the State board of equalization, composing an original assessing board, were in the main placed upon the same basis of valuation as had previously been the personal and real property of the State.

Q. Now, Captain, will you kindly state, if you can, what would be a fair average figure that would represent the proportion of actual value adopted throughout the State, well, say, dur-
34 ing the past five years, for the assessment of real and personal property?

A. Well, I would reply to that, that taking personal property and real property altogether, outside of the city of St. Louis, the average valuation was about forty per cent.

Q. In other words, that outside of the city of St. Louis the taxes during the past five years, for illustration, would be assessed on a

valuation that would be about forty per cent. of the actual value of real and personal property?

A. The State board of equalization has heard a great deal of evidence on this point and that is my conclusion drawn from that evidence.

Q. And what would the proportion be, Captain, stating as nearly as you can from your official knowledge, with respect to the city of St. Louis which you excluded in your preceding answer?

A. I would answer that question also in an explanatory way. Necessarily they state that they assess the property at a little higher valuation than collateral testimony shows it is assessed. I don't think that is a matter of bad faith or intentional misrepresentation, but simply grows out of the natural desire to approximate to the law as closely as possible. In the city of St. Louis the assessor and board of assessors make the statement that their valuation is about seventy per cent. of the actual cash value of property. From other testimony and investigations made by the State board of equalization in years past and personal inquiry, my own opinion is that property in the city of St. Louis is assessed at more nearly fifty per cent. of its actual cash value than the sum above stated.

Q. Then, Captain, from your knowledge as an officer of the State board of equalization and your personal information, am I right in saying that it is your best judgment that during the past five or perhaps more years property throughout the State in the various counties and cities, other than the city of St. Louis, real and personal, has been assessed at about forty per cent. of its actual cash value and in the city of St. Louis at about fifty per cent. of its actual cash value?

35 A. That is my opinion.

Cross-examination by Mr. E. C. SLEVIN:

Q. When you say that from the records of the board that franchises constituted an element of the phrase "all other property," what do you mean by franchises?

A. I cannot answer that question.

Q. Referring to the phrase "all other property," wasn't the valuation termed "all other property" ascertained by the following rule: Take the market value of the capital stock of the Western Union Telegraph Company and prorate to the State of Missouri such portion thereof as the mileage of poles and wires in Missouri bears to the total mileage of the company throughout the United States?

A. I cannot answer that question.

Redirect examination by Mr. ELENEIOUS SMITH:

Q. Captain what do you mean and what is your understanding of the term "franchises" as used in taxation by the State board of equalization.

A. I do not undertake to say what definition is placed on franchise valuation by the State board of equalization. My own understanding of the term is that in regard to quasi-public corporations

enjoying certain privileges granted by law there is a value in addition to that of the tangible property. The most feasible manner of arriving at an estimate of this valuation seems to be to ascertain the market value of the capitalization of the corporation, as a general rule, the market value of its shares of stocks and bonds, and from this to deduct the valuation of the tangible property, real and personal, which is otherwise assessed.

Q. And the difference between the valuation of the tangible property and the valuation of the entire property as above indicated is to be considered the franchise valuation?

A. Yes, sir.

Q. Captain, do you know whether the method you have mentioned was or was not adopted by the State board of equalizatiou in fixing any valuation of franchises in this Western Union assessment?

A. I cannot answer the question.

Q. Do you know whether or not Attorney General Crow presented a resolution for the assessment of the Western Union almost
36 exactly in accord with the explanation you have given us as to your idea of the way in which franchises should be valued and that the board in fixing the Western Union's assessment practically adopted Attorney General Crow's plan?

A. I prefer not to answer that question, because, in the first place, the record is the best evidence; and, in the second place, I wouldn't like to make a statement of that kind at this distance from the action taken without having the record before me.

Q. Well, Captain, I don't wish to suggest to you that such a resolution was made any part of the official record of the board, but assuming that your evidence as to what was the fact would be competent and would be considered by a court, I ask you if, as a matter of fact, that was not the method by which the figures contained in the assessment under the term of "all other property" were actually arrived at by the board?

A. I think I have declined to answer this question practically two or three times for reasons which I have explained above.

Recross-examination by Mr. E. C. SLEVIN:

Q. When you speak of the word "franchise" above in your direct examination as constituting an element in this assessment you do not mean the privilege to exist as granted by the State government or the General Government?

A. My view in regard to that is that the assessment is placed on an actual valuation, which partially grows out of the privilege to operate.

Q. I understood you to say a moment ago that your view was based on the capitalization of the company?

A. Yes, sir; I explained that, because, of course, it is very clear to everybody who is familiar with corporate operation and capitalization that capitalization does not always represent value. For instance, two corporations may be formed with a capitalization of one hundred thousand dollars each and do business for five years, at the

end of which time one may have lost all of its investment
37 and the other may have enhanced the value of its establishment by five hundred per cent. There could not be the same valuation in the one as the other. Sometimes capitalization represents valuation and sometimes it does not. This, as I have indicated above, must be determined, for assessments are to be made thereon by the best test, which is the market value of that which represents the capitalization of the corporation.

Q. Exactly. Therefore, in the two corporations of one hundred thousand dollars each which you have mentioned one would be represented at a valuation nil and the other one would be represented at a capitalization of five hundred thousand, because that is the actual cash value of its capital stock, is that not a fact?

A. That is my view.

Q. Therefore, the assessment is not made upon an intangible valuation or thing, but it is made upon an actual thing, the capital stock representing actual valuation?

A. I think so.

Q. That seems pretty plain?

A. I think so, and in using the word "tangible" property as contradistinguished from the franchise value, so called, I have simply followed the ordinary definition.

Q. Upon that explanation if the franchises of the Western Union Telegraph Company were considered in the valuation by the State board, it was not on franchises to be, but it was on the actual cash market value of the stocks that were considered by the State board?

A. That is your statement.

Q. It is a statement with an interrogation point at the end?

A. That is a question for the State board to answer as a board.

Signature waived.
(Notary's certificate.)

Mr. SMITH: The next deposition which we offer is the deposition of Edward C. Crow.

Said deposition, omitting the formal parts, is as follows:

EDWARD C. CROW, of lawful age, being produced, sworn and examined on behalf of the defendant, deposeth and saith:

Direct examination by ELENEIOUS SMITH, Esq.:

38 Q. Please state your full name.

A. Edward C. Crow.

Q. What position, if any, do you hold in the State of Missouri?

A. I am now and have been since January 11, 1897, attorney general of the State of Missouri.

Q. And you have been recently elected for a new term, beginning the coming January?

A. Yes, sir.

Q. General, I will ask you whether or not there are two State

boards of equalization of the State of Missouri, one being constitutional and the other statutory?

A. Well, it is all one board as we take it, but the constitution provides for a board of assessment of railroad property, I believe.

Q. Now, as I understand it, the State board of equalization of which you are, and during your term as attorney general have been a member, is the board which is the original board of assessment of the property of railroad, telegraph and railroad bridge companies?

A. Well, I have never divided up the boards that way, Mr. Smith, in my mind; I am not prepared to say that there is such a division.

Q. Am I correct then, in putting it this way, that the State board of equalization composed now and at all times during your term of office, of the governor, the attorney general, secretary of state, auditor and treasurer of the State, performs possibly, among other functions, those of original assessment or fixing valuations for the purposes of taxation of railroad, telegraph and bridge properties, and in addition to that, the equalizing of the values of real and personal property of a general character throughout the State?

A. I will answer that in this way: The State board of equalization, composed as stated in the above question, meets in February of each year and has laid before it the record of assessments as returned by the county assessors and county clerks of one hundred and fourteen counties in the State, and likewise the assessment by the assessing officials in the city of St. Louis, and upon the reception of this record, the State board of equalization proceeds to equalize
39 the value according to their judgment of the real and personal property of the different counties and the city of St. Louis, and in May of each year the State board of equalization meets and assesses and equalizes the valuation of steam railways, street railways, telegraph and bridge property throughout the State.

Q. General, I will ask you if in the year 1899 you remember in a general way that you were a member of the board of equalization by virtue of your office?

A. Yes, sir; I have already stated that.

Q. And do you remember that some time during the early part of 1899, there was presented to the board a return by the Western Union Telegraph Company of its property as of June 1st, 1898, I believe?

A. Well, without seeing the record of course I couldn't remember the date not the fact as to how a return was made, nor exactly what was in it, but in a general way I remember of course that the Western Union Telegraph Company had a return before our board, and I suppose it was timely made and in proper form, as it usually is.

Q. General, as we have not the original records of the State board of equalization before *is*, I will hand you what purports to be a copy from the official records of your board certified by State Auditor Seibert under his hand, and the auditor's seal of State, purporting to be a copy of the board's record with respect to the Western Union Telegraph Company's assessment made in 1899, with respect to property as of June 1st, 1898. I will ask you if you recognize it?

A. Well, I couldn't say that I could identify that. The language

of the resolution down to the figures in a general way seems familiar to me, but I have in mind that the figures were different from that, but that looks like the resolution that we had there. I could not identify it positively, but I expect it is the same thing. It is on that same general line; I guess it is.

Q. Now, General, in reading over the certified copy, which I will ask the notary to attach to your deposition and mark Exhibit A, I find in this resolution or record of your board, assuming it
40 to be as it purports to be, a true copy from the records, that certain property is specifically mentioned, so many miles of pole, so many miles of wire, and so many instruments, and then the generic term "all other property" at $856,400.56. Referring to the language of the resolution or record entry, whatever is the proper term, I see it sets forth that the board considered the facts set out in the returns and the statements of the company, all evidences of value and all matters bearing upon the question of the value of the property of the company, cost of construction and equipment, the location thereof, its traffic and business, the market and par value of its stocks and bonds, the gross receipts and net earnings and franchise owned by said company and the value thereof, and also evidence concerning the value of the cost of construction of the telegraph line, the market value and par value of the stocks and bonds, gross receipts and net earning power, the franchise and value thereof, in fixing the figures, which they did. Have you any independent recollection from the copy of the record which I have handed you, that these things were considered by the board in reaching these figures, assuming them to be correct?

A. I desire to say in answer to that question, that I suppose the record tells exactly what happened there and sets forth as accurately as I could set forth, what the board considered in fixing that value.

Q. Then, General, assuming, as I believe is the fact, that you did vote in favor of the entry that is here, the resolution or whatever it may be styled, your recollection is that the record properly sets forth the action on your part, as well as that of the other members?

A. Why, I don't know whether we voted to assess it at that figure or not. That purports to be a copy. I guess that copy is correct. We voted to increase that assessment; we did increase it very materially. We increased it over prior years; we did do that. But I will say this with reference to that record, that the record there of course only discloses the results of the findings of the board,
41 and it does not purport to set forth all the details, the facts and the evidence which we have before us, which facts and evidence of course you will find reported very fully in the official records of the board, and as far as the other members of the board are concerned, I can't say what they considered in voting, which they did vote for the resolution, and in basing that value. I can only speak for myself, and in speaking for myself, I did consider all those things in arriving at that value.

Q. There is an item which is not specific; of course we understand what poles and wires and instruments are, but there is one

item in the assessment which the board made for that year under the heading "All other property at $856,400.56," and I will ask you, of course as a matter of your own recollection, if you can tell us what from your standpoint was embraced in that item?

A. In reply to your question I would say that I could not now name what all was included in that item of "all other property," but it occurs to me that there was other tangible property included in the item "all other property," besides the enumerated items preceding this one in the schedule; for instance, desks and office furniture, repairs and the various classes of property that I presume the company then had and now has, subject to taxation in this State. I suppose also there was included in that what is known as the intangible value of property, to wit, the franchise value, but as to how much the franchise value or intangible property was valued at and how much the tangible property other than that specifically enumerated included under the head of "all other property" was valued at, I could not say.

Q. General, are you able in your mind, even in the roughest way, to fix the proportion of the one to the other; I mean on any basis at all that you think would be about right?

A. Not at this time. I would have to make the figures and look at the full record before me as it was then, and I don't know that even from that I could arrive at anything like an accurate conclusion.

42 Q. Let me ask it in this way. Are you able from your memory to say whether or not the intangible property, such as franchise, constitutes a considerable part of this $856,400.56 without binding you to the proportion or figures?

A. Without undertaking to be specific as to figures or as to proportional quantities, I would say that in my opinion the intangible value of the property of the Western Union Company in this State constituted a considerable element in the item last enumerated in the schedule of property under the designation of "all other property."

Q. General, I will hand you a copy of what purports to be a paper on file among those of the board of equalization for 1899, and ask you if you recognize it, and if so, whether or not it was prepared by you and fairly sets forth the methods of reaching among other items that last one in which I am interested, to wit, the item of "all other property"?

A. Well, in a general way I would say that I think I perhaps may have drawn that resolution and I am inclined to think that I did.

Q. And can you say whether or not this final item of $856,400.56, under the head of "all other property," was reached in the manner indicated in the resolution, and as practically recited on the record?

A. Well, I would say in answer to that, that it sets forth here in the concluding clause of this resolution that the board "having given the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company,

through its officers and agents, and having carefully considered the facts set out in the returns"—of course that takes in all your property that you set out in the return; what that is, I don't know, but there is a great long schedule of it—"and the statements of said company," that includes the records made by Mr. Cook which are a part of the records of the board taken down in shorthand, and "all evidences of value and all matters bearing upon the question of value of the property of said company," which would include
43 the knowledge of the board with reference to the value of all the tangible and all the intangible property and the other question, "all other property"—"and considering the cost of construction and equipment of said Western Union Telegraph Company," and the place where the lines when constructed were erected, the volume of business, the receipts, the value of the stocks and bonds and earnings after paying fixed charges and the franchises owned by the company and the value of said franchises, and I am of the opinion that this general statement covers pretty fairly my idea of what went to make up the different items that constituted the aggregate of $1,827,727.46.

I hand this paper to the notary, being the last paper referred to by General Crow, and ask the notary to mark it Exhibit "B" to the examination of this witness.

Paper withdrawn by defendant.

Cross-examination by E. C. SLEVIN, Esq.:

Q. What do you understand by the meaning of the word "franchise" as used by you in your direct examination?

A. Well, the sense in which I use it might not be agreed to by lawyers or laymen without qualification, but I used it in the sense of representing the class of property owned by the Western Union Telegraph Company and controlled by it, such as the privileges and rights to erect and maintain their poles and wires, to carry on their traffic in the different portions of the State of Missouri in connection with their rights to so erect their poles and wires and carry on their traffic wherever else their lines extended in this country and other countries, representing a unity of use in the entire corporate property, making the same thereby much more valuable than it otherwise would be for use separately and independently in each Territory or country.

Q. And therefore the privilege to be or to exist does not enter into your idea at all in the matter of values as you have explained
44 by way of franchise?

A. Oh, no. As I understand it, the Western Union corporation acquires their right to exist as a corporation from an act of the Federal Congress; they have this, however, which I did not consider, and that is the right to use the posts of the Federal Government. I did not consider that as an element in fixing the franchise value of property in the use of my term of the word "franchise," although it might properly be considered, as the courts have held in

a Massachusetts case, but I did not have that in mind when I used the word "franchise."

Mr. SMITH: We offer a certified copy from the record of the State board of equalization containing the resolution and entry under which the assessment complained of was made:

Said copy is as follows:

STATE OF MISSOURI,
Office of State Auditor.

Be it remembered that heretofore, to wit, on the twenty-fifth day of July, 1899, the following, among other proceedings, were had by the State board of equalization, viz:

The State board of equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidences of value, and all matters bearing upon the question of the value of the property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Company, and the locaton thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and of the gross receipts and net earning
45 power, and the franchise and the value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the State board of equalization assesses and values for taxes of 1899 the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the State board of equalization that the assessed value thereof be distributed upon the said classes of property as follows:

6,075.98 miles of poles at $71.50 per mile.....	$434,432.57
23,767.34 miles of wire at $22.02 per mile.....	523,356.82
2,375 instruments at $5.70 each	13,537.50
All other property at.....	856,400.56
Total.....	$1,827,727.45

STATE OF MISSOURI,
Office of State Auditor.

I, James M. Seibert, State auditor of the State of Missouri, do hereby certify that the above and foregoing is a true, full and complete copy of the order of the State board of equalization, respecting

the assessment of the property of the Western Union Telegraph Company for taxes of 1899, as fully as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State auditor. Done at office in the city of Jefferson, this 8th day of June, 1900.

[SEAL.]

J. M. SEIBERT,
State Auditor.

Mr. SMITH: I offer a certified copy of the return under oath made by T. P. Cook, superintendent of defendant company, which purports to have been sworn to on the 16th day of January, 1899, and filed on the 17th day of January, and being certified by State Auditor Seibert. Said return is as follows:

46 *Property Owned by the Western Union Telegraph Company on June 1st, 1898, Returned for Taxation of the Year of 1899, in the State of Missouri.*

County.	Miles of poles.	Valuation at $50.00 per mile.	Miles of wire.	Valuation at $10.00 per mile, including instruments and batteries.	Total valuation returned.	Taxes, 1898.
Adair	65.94	$3,296 00	130.82	$1,308.20	$4,605.20	$142.42
Andrew	41.34	2,067.00	95.41	954.10	3,021.10	107.18
Atchison	53.09	2,654.50	151.94	1,519.40	4,173.90	106.61
Audrain	78.24	3,912.00	622.79	6,227.90	10,139.90	304.65
Barry	45.10	2,255.00	100.50	1,005.00	3,260.00	113.72
Barton	86.76	4,338.00	244.71	2,447.10	6,785.10	203.27
Bates	102.34	5,117.00	267.71	2,677.10	7,794.10	229.61
Benton	28.95	1,447.50	28.95	289.50	1,737.00	61.44
Bollinger	33.16	1,658.00	52.97	529.70	2,187.70	89.38
Boone	82.42	4,121.00	331.22	3,312.20	7,433.20	213.61
Buchanan	141.53	7,076.50	548.77	5,487.70	12,564.20	431.98
Butler	51.04	2,552.00	233.56	2,335.60	4,887.60	198.69
Caldwell	48.38	2,419.00	145.14	1,451.40	3,870.40	125.44
Callaway	77.29	3,864.50	184.21	1,842.10	5,706.60	226.02
Camden	4.00	200.00	16.00	160.00	360.00	10.00
Cape Girardeau	77.15	3,857.50	139.40	1,394.00	5,251.50	118.77
Carroll	67.44	3,372.00	559.72	5,597.20	8,969.20	318 23
Carter	44.82	2,241.00	44.82	448.20	2,689.20	67.58
Cass	173.40	8,652.00	536.50	5,365.00	14,017.00	674.29
Chariton	81.91	4,095.50	536.05	5,360.50	9,456.00	306 86
Christian	33.48	1,674.00	74.48	744.80	2,418.80	76.14
Clark	59.19	2,959.50	182.55	1,825.50	4,785.00	189.84
Clay	80.06	4,003.00	440.02	4,400 20	8,403.20	275.54
Clinton	88.52	4,426.00	215.08	2.150.08	6,576.80	201.54
Cole	47.37	2,368.50	291.37	2,913.70	5,282.20	202.18
Cooper	72.64	3,632.00	265.36	2,653.60	6,285.60	179.08
Crawford	53.55	2,677.50	133.20	1,332.00	4,009.50	108.13
Dade	36.15	1,807.50	112.53	1,125.30	2,932.80	124.96
Daviess	103.16	5,158.00	323.58	3,235.80	8,393.80	223.94
De Kalb	46.71	2,335 50	130.50	1,305.00	3,640.50	121.28
Dent	13.00	650.00	13.00	130.00	780.00	21.11
Dunklin	26.94	1,347.00	54.12	541.20	1,888.20	47.87
Franklin	98.21	4,910.50	587.79	5,877.90	10,788.40	484.52

Property Owned by the Western Union Telegraph Company, etc.—Continued.

County.	Miles of poles.	Valuation at $50.00 per mile.	Miles of wire.	Valuation at $10.00 per mile, including instruments and batteries.	Total valuation returned.	Taxes, 1898.
Gasconade	16.28	$814 00	179.08	$1,790.80	$2,604.80	$90.77
Gentry	68.64	3,432.00	118.06	1,180.60	4,612.60	117.51
Greene	108.76	5,438.00	362.43	3,624.30	9,062.30	323.09
Grundy	53.82	2,691.00	215.42	2,154.20	4,845.20	175.44
Henry	96.34	4,817.00	231.37	2,313.70	7,130.70	233.21
Holt	68.89	3,444.50	255.68	2,556.80	6,001.30	169.01
Howard	49.09	2,454 50	243.41	2,434.10	4,888.60	168.49
Howell	57.07	2,853 50	174.19	1,741.90	4,595.40	175.05
Iron	33.69	1,684.50	202.14	2,021.40	3,705.90	126.88
Jackson	168.47	8,423.50	1,052.95	10,529.50	18,953.00	698.27
Jasper	123.14	6,157.00	340.60	3,406.00	9,563.00	308.06
Jefferson	30.93	1,546.50	261.16	2,611.60	4,158.10	169.76
Johnson	86.84	4,342.00	475.70	4,757.00	9,099.00	368.09
Knox	40.27	2,013.50	113.23	1,132.30	3,145.80	170.71
Laclede	38.05	1,902.50	152.50	1,522.00	3,424.50	115.94
Lafayette	106.55	5,327.50	386.63	3,866.30	9,193.80	304.91
Lawrence	51.44	2,572.00	140.61	1,406.10	3,978.10	129.92
Lewis	45.45	2,272.50	67.01	670.10	2,942.60	93.75
Lincoln	53.92	2,696 00	74.80	748.00	3,444.00	118.54
Linn	40.95	2,047.50	147.07	1,470.70	3,518.20	108.78
Livingston	90.32	4,516.00	261.94	2,619.40	7,135.40	233.17
McDonald	20.96	1,048.00	62.88	628.80	1,676.80	49.38
Macon	88.06	4,403.00	288.02	2,880.20	7,283.20	229.49
Madison	26.10	1,305.00	49.70	497.00	1,802.00	47.74
Marion	71.83	3,591.50	250.74	2,507.40	6,098.90	175.10
Mercer	25.02	1,251.00	125.10	1,251.00	2,502.00	90.38
47 Miller	19.27	963.50	19.27	192.70	1,156.20	27.73
Mississippi	59.81	2,990.50	144 99	1,449.90	4,440.40	147.05
Moniteau	35.58	1,779.00	277.58	2,775.80	4,554.80	172.33
Monroe	45.68	2,284.00	217.29	2,172.90	4,456.90	128.70
Montgomery	39.66	1,983.00	320.04	3,200.40	5,183 40	194.28
Morgan	19.48	974.00	92.48	924.80	1,898.80	83.13
New Madrid	43.81	2,190.50	153.23	1,532 30	3,722.80	138.05
Newton	66.18	3,309.00	162.76	1,627.60	4,936.60	142.15
Nodaway	116.05	5,802.50	220.56	2,205.60	8,008.10	240.23
Oregon	14.63	731.50	58.52	585.20	1,316.70	48.74
Osage	23.83	1,191.50	262.13	2,621.30	3,812.80	138.33
Pettis	90.50	4,525.00	490.94	4,909.40	9,434.40	372.93
Phelps	32.75	1,637.50	131.00	1,310.00	2,947.50	89.03
Pike	88.37	4,418.50	305.05	3,050.50	7,469.00	300.37
Platte	73.40	3,670.00	271.31	2,713.10	6,383.10	235.77
Polk	47.48	2,374.00	106.10	1,061.00	3,435.00	68.31
Pulaski	32.75	1,637.50	131.00	1,310.00	2,947.50	85.06
Putnam	24.71	1,235.50	64.13	641.30	1,876 80	63.68
Ralls	63.85	3,192.50	172.40	1,724.00	4,916.50	198.48
Randolph	80.34	4,017.00	588.43	5,884.30	9,901.30	324.80
Ray	93.78	4,689.00	469.89	4,698.90	9,387.90	282.81
Ripley	15.93	796 50	31.86	318.60	1,115.10	27.32
St. Charles	88.15	4,407.50	528.73	5,287.30	9,694.80	263.21
St. Clair	48.08	2,404.00	121.38	1,213.80	3,617.80	78.65
St. François	35.54	1,777.00	137.26	1,372.60	3,149.60	106.21
St. Louis City	76.53	3,826.50	1,050.97	10,509.70	14,336.20	1,153.59
St. Louis	150.60	7,530.00	921.41	9,214.10	16,744.10	520.70

Property Owned by the Western Union Telegraph Company, etc.—Continued.

County.	Miles of poles.	Valuation at $50.00 per mile.	Miles of wire.	Valuation at $10.00 per mile, including instruments and batteries.	Total valuation returned.	Taxes, 1898.
Saline	83.23	$4,161.50	332.09	$3,320.90	$7,482.40	$244.04
Schuyler	39.59	1,979.50	85.18	851.80	2,831.30	110.89
Scotland	32.82	1,641.00	96.36	963.60	2,604.60	103.78
Scott	34.66	1,733.00	57.03	570.30	2,303.30	66 65
Shannon	27.30	1,365.00	27.30	273.00	1,638.00	44.78
Shelby	24.74	1,237.00	74.22	742.20	1,979.20	59.20
Stoddard	88.93	4,446.50	88.93	889.30	5,335.80	160.47
Sullivan	52.11	2,605.50	88.91	889.10	3,494.60	105.79
Texas	17.69	884.50	70.76	707.60	1,592.10	60.12
Vernon	130.88	6,544.00	373.04	3,730.40	10,274.40	306.41
Warren	46.87	2,343.50	296.44	2,964.40	5,307.90	155.96
Wayne	65.94	3,297.00	227.64	2,276.40	5,573.40	181.54
Washington	24.28	1,214.00	166.24	1,662.40	2,876.40	105.62
Webster	48.87	2,443.50	195.48	1,954.80	4,398.30	124 48
Wright	27.53	1,376.50	110.12	1,101.20	2,477.70	90.33

6,075.98 miles of poles at $50.00 per mile $303,799.00
23,767.34 miles of wire at $10 00 per mile 237,673.40

Total $541,472.40

48 THE STATE OF MISSOURI, }
City of St. Louis. }

I, T. P. Cook, superintendent, do solemnly swear that the foregoing inventory rendered by me contains a full, true and complete list of all taxable property owned or held by me for the Western Union Telegraph Company in the several counties of Missouri, and all personal property in the said counties, subject to taxation by the laws of Missouri on the first (1st) day of June, eighteen hundred and ninety-eight (1898), and that I have made true answers to all questions propounded to me touching the same, so help me God.

(Signed) T. P. COOK,
Superintendent.

Subscribed and sworn to before me, this 16th day of January, 1899. (Term ends June 30th, 1901.)

C. D. GREEN, JR.,
[SEAL.] *Notary Public.*

Endorsed: Filed January 17th, 1899. J. M. Seibert, State auditor.

A true copy.
Attest:
(Signed) J. M. SEIBERT,
[SEAL.] *State Auditor.*

The defendant offered and read in evidence the deposition of Theodore P. Cook, in the words and figures following:

In the Circuit Court of Jackson County, Missouri.

STATE *ex Rel.* CHRIS GOTTLEIB, Collector of the Revenue, Plaintiff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant.

Deposition of Theodore P. Cook, a witness produced, sworn, and examined on the eighth day of January, in the year of our
49 Lord 1901, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the office of Dickson & Smith, No. 1105 Union Trust building, in the city of St. Louis and State of Missouri, before me, Margaret Nealon, a notary public within and for the city of St. Louis, in the State of Missouri, in a certain case now pending in the circuit court of the county of Jackson, in the State of Missouri, between The State *ex rel.* Chris Gottleib, collector of the revenue, plaintiff, and The Western Union Telegraph Company, defendant, on the part of the defendant.

Appearances: Eugene C. Slevin for plaintiff, and Eleneious Smith on behalf of the defendant.

THEODORE P. COOK, of lawful age, being produced, sworn and examined on the part of the defendant, deposeth and saith:

Q. Now, Mr. Cook, please state your full name, age, residence and occupation.

A. My name is Theodore P. Cook; age, 55 years; residence, St. Louis, Missouri; superintendent of Western Union Telegraph Company.

Q. What territory, Mr. Cook, is under your jurisdiction as the company's superintendent at St. Louis?

A. Well, there are about six States, including the whole of Missouri.

Q. How long have you been associated with the Western Union Telegraph Company in any capacity?

A. Well, about twenty-eight years.

Q. Continuously?

A. Yes, sir.

Q. What kinds of positions have you held during your twenty-eight years of service?

A. I have been manager of offices and assistant superintendent of telegraph, and superintendent of telegraph.

Q. How long have you been superintendent in charge of the St. Louis office?

A. Since April 1, 1897.

Q. You held the position continuously since that time?

A. Yes, sir.

Q. I will ask you, Mr. Cook, whether or not you have any
50 familiarity with the construction of telegraph lines and particularly the Western Union system, in addition to familiarity with the operation, and generally of the business of the company?

A. Yes, sir. I have had a good deal of experience in construction of all kinds.

Q. Have you also had experience in operation, by which I mean the conduct of the company's business?

A. Yes, sir.

Q. How long have you known the Western Union system as it existed in Missouri and exists today?

A. About twenty-five years.

Q. In what way have you acquired that familiarity, and especially during the period prior to April, 1897?

A. Well, as assistant superintendent I traveled over the country a great deal, inspected offices and lines and looked after various matters.

Q. Did you make the return for the company for taxation purposes as required by the laws of Missouri in January, 1899, for the year 1899, pertaining to the property of the company in the State as of June 1, 1898?

A. I did.

Q. You are familiar with that return, a certified copy of which I show you, are you not? (Copy handed witness.)

A. Certainly.

Q. Mr. Cook, I observe that that return purports to give a valuation as fixed by you on behalf of the company in the various counties and certain cities of the State of Missouri, of the poles of the company by miles, the wire of the company by miles, under the latter head there being the statement that it includes instruments and batteries. Am I right in my interpretation of the returns?

A. Yes, sir.

Q. Now, first, although that return is sworn to, I will ask you whether that return faithfully sets forth, both in its detail and in its aggregate, the miles of wire and poles of the company in the State of Missouri on June 1, 1898?

A. The aggregate of miles of poles and wires is absolutely correct.

51 Q. I will ask you, Mr. Cook, whether the company on June 1, 1898, owned any real estate whatever in the State of Missouri?

A. No, sir.

Q. I will ask you whether it owned any property in the State of Missouri, other than poles, wires and the accompanying fixtures and batteries and instruments?

By Mr. E. C. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. Yes; it had.

Q. Have you, Mr. Cook, at my instance, made up a list of the

property owned by the Western Union on June 1, 1898, in Missouri, other than poles, wires, their fastenings and batteries and instruments?

A. Yes, I have.

Q. Will you please state of what that property consisted, if you can?

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. Three horses, three wagons, forty desks, 883 chairs, 28 counters and partitions, 33 cupboards or closets, 23 stoves, 153 tables and certain dynamos in St. Louis and Kansas City, which really come under the head of batteries.

Q. Well, anything more?

A. No, sir; that is all.

Q. Where, if you know, Mr. Cook, was the greater portion of this property that you have just mentioned, located?

A. The greater portion in St. Louis and Kansas City and St. Joseph.

Q. I will ask you, first, if you know of any property whatever of any kind or character, owned by the Western Union in Missouri on June 1, 1898, other than the poles, wires, etc., set forth in the return to the board of equalization and the property that you have just mentioned?

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

52 A. None that I know of.

Q. I will ask you if you know whether or not the property you have just described was taxed in St. Louis, Kansas City or St. Joe? I mean for the year 1899.

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. It was.

Q. And also as to whether such taxes were or were not paid?

A. They were paid.

Q. Have you the tax bills covering this property that we have been mentioning for the three cities mentioned as paid?

A. I have.

Q. Please produce them.

The three tax bills last above referred to were here handed to Mr. Smith.

By Mr. SLEVIN:

Q. For the year 1899?

A. Yes, sir.

By Mr. SMITH (resuming examination):

Q. Mr. Cook, I will ask you whether or not you are familiar with the character of property that is covered by the tax bills which you

have just handed me, and which I will ask to be marked for identification, Exhibit "A," "B," and "C," and attached to your deposition, and I will exclude from that question the item in the St. Joseph tax bill of merchants' tax.

The documents last above referred to are attached as exhibits to this deposition and marked respectively Exhibits "A," "B," and "C."

A. I am familiar with it.

Q. Well, will you state, if you please, the character of property covered by these three receipts, omitting the merchants' item under the St. Joseph bill, Exhibit "C"?

A. They cover furniture, desks, horses and wagons, chairs and things of that kind.

Q. Is it limited to property such as that you have hereto-
53 fore described?

A. Yes, sir.

Q. Do you know whether there is embraced in those three bills, or any of them, omitting from consideration the item, "merchants," in the St. Joe bills, any poles, wires or property of that character?

A. No, sir; that is given in the general mileage of the State.

Q. Are you able to give us approximately, and I will ask you to make an outside figure, one that you can swear is large enough, of the value of the personal property owned by the company, other than poles, wires and batteries, and of the kinds specifically described by you on June 1, 1898, in the State of Missouri, outside of the cities of St. Louis, Kansas City and St. Joseph?

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. Well, I would estimate $1,000.00 would fully cover it.

Q. Please state what in your judgment, then, would be a fair aggregate valuation for what I may term "outside property" of the character you have described in the entire State of Missouri on June 1, 1898.

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. I should say that $5,000.00 would cover it.

Q. Mr. Cook, you are familiar, and I suppose have been since at least your assumption of the position of superintendent, with the company's matters in Missouri, and the property that they own, and the rights that they have, contract, ordinance and otherwise?

A. Yes, sir; I know.

Q. I will ask you if, to your knowledge or information, the company possess any rights by way of ordinance, gift or any franchise that you are at all familiar with, coming from the State of Missouri, or any of its subdivisions, counties or municipalities, and I will ask you this particularly with reference to June 1, 1898, but ask that your answer not only cover that time, but the time prior and
54 since?

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is irrelevant and immaterial.

A. Well, we have no record of any ordinance or concession that I call to mind, except a small one of about a year ago, which was a permit from the city of Columbia to put poles on certain streets in a certain locality.

Q. And that, as I understand you, was an ordinance passed by the authorities of the city of Columbia?

A. Yes; to set poles in a certain locality in that city.

Q. Giving permission to set poles in that city, but in a certain locality?

A. Yes, sir.

Q. Are you familiar with any other rights or franchises of any kind or character that you can call to our attention, given either by the State or any of the municipalities?

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the same grounds—*i. e.*, irrelevancy, and because it is immaterial.

A. I do not.

Q. I will ask you to describe briefly the extent of the business of the Western Union Telegraph Company, by which I mean the parts of this country or other countries that it operates in; in other words, very briefly describe the extent of the operations of the Western Union Company.

A. Well, they operate in all sections of the country I have traveled through—that is, so far as my knowledge goes—and all over the United States.

Q. Do you know whether their lines reach beyond the United States?

A. Well, they connect with lines with different countries—Mexico, Canada, and the ocean cables.

Q. Do you know whether the lines extend, for illustration, from Illinois, across the Mississippi river into and through Missouri, and across the Missouri, and into adjoining States?

55 A. Yes, sir; in quite a number of places, St. Louis and Kansas City.

Q. Has your company, for instance, a through line that would run from New York, via St. Louis and Kansas City, to Omaha, for illustration?

A. Yes, sir; and San Francisco, and in various directions; also to Texas.

Q. I will ask you whether on June 1, 1898, you were familiar with the condition first of the company's system in Missouri, by which I mean the extent of its poles and wires, their condition, including batteries and the company's equipment?

A. Yes, sir; I was.

Q. I will ask you whether or not, Mr. Cook, you were, at that time or now, sufficiently familiar with the cost of the material and expense of labor that would go into the construction of such a sys-

tem as the company had in Missouri on June 1, 1898, as will enable you to give us those figures, both in the aggregate and in detail?

A. Yes, sir; I was thoroughly familiar with the cost of material and construction.

Q. In the first place, will you please state, necessarily in a general way, the condition of the company's system in Missouri on June 1, 1898?

A. In my judgment—well, the deterioration you mean?

Q. I mean its general condition.

By Mr. SLEVIN: Plaintiff's counsel objects to the question on the ground that it is immaterial and irrelevant.

A. I think at that time the deterioration for new material would be, at least, 65 per cent.

Q. Now, I suppose, that the reconstruction and repair and replacement of poles and wires and batteries is going on continuously in Missouri and elsewhere, is it not?

A. Yes, sir.

Q. Is it a fact in 1898, the poles, for instance, would be in various stages of decay, some new and some old?

A. Yes, sir; some were old, very old.

56 Q. What is the average life of a telegraph pole in the outlying districts, for instance?

A. From eighteen to twenty years.

Q. Do you make that statement as the result of those twenty-five years' of observation that you speak of?

A. Yes, sir.

Q. Mr. Cook, I will ask you whether or not you have made up a statement showing in detail the cost of material and labor for the erection of one mile of poles and one mile of wire in the State of Missouri on June 1, 1898, and also a statement as to the cost at that time of the company's battery and instrument system in Missouri.

A. I have.

Q. Well, will you give us the cost of constructing a mile of poles, and by poles I mean new poles, of the average character of those that existed in Missouri on June 1, 1898?

A. Well, new poles of the standard size and quality used at that time, including the labor of erecting, complete, cost $61.90 per mile.

Q. Have you made up a statement showing the cost of one mile of wire with its fastenings and the stringing of the same in Missouri at that time.

A. Total cost at that time, $24.41 per mile.

Q. Now have you multiplied those figures respectively by the actual pole and wire mileage in the State of Missouri on June 1, 1898, so as to give aggregate results?

A. On the date the returns were made we had 6,076 miles of poles, which new, at $61.90 per mile, would have cost $376,104.40; on the same date we had 23,736.34 miles of wire, if new at $24.41 per mile; total $580,159.76.

Q. Now have you also made up, Mr. Cook, the figures that would

show the cost at an ordinary market price on June 1, 1898, of the battery and instrument system of the company in Missouri?

A. I have, and furnish a list of the total number of all kinds of instruments and the cost.

Q. What do they aggregate?

A. $28,093.73.

Q. Now what is the grand total, if you have made it, of the
57 three classes of items?

A. $984,357.89.

Q. Will you please attach the total statement that you have made up, and from which you have just testified, to your deposition, in order that the notary may mark it "Exhibit D"?

A. Yes, sir.

The statement last above referred to is attached to this deposition as an exhibit thereto, and marked "Exhibit D."

Q. Now, Mr. Cook, am I right in my understanding that the grand aggregate you have just given — you testify would, from your knowledge, produce a new plant of the character and size and extent that existed in Missouri on June 1, 1898, barring the outside personal property, such as tables, chairs, horses and wagons, etc.?

A. Yes, sir.

Q. And to that aggregate, how much, if you please, should be added in order to make up, if you can give it to us, an absolutely new plant on June 1, 1898, that would cover all property of every kind and character of the company in Missouri on June 1, 1898?

By Mr. SLEVIN: Plaintiff's counsel objects on the ground that the question is irrelevant and immaterial.

A. I don't know that I could give you that; I think $10,000.00 would replace them new.

Q. So that $10,000.00 added to the $984,357.89 would, if my understanding of your testimony is correct, in your judgment, have made an entirely new plant in Missouri?

A. Of everything.

Q. Have you picked out, Mr. Cook, some sample invoices from the files of the company, showing the cost of wire, poles and instruments about the period that we have been considering, June 1, 1898?

A. Here are the original invoices; yes, sir. I have the original invoices.

Q. I will ask you whether or not those that you have selected fairly represent the prices paid during the year 1898, or whether you have selected those of the lowest figures?

A. I have made this of the largest, in figuring out the
58 mileage of poles. I have taken $1.10 each, although we have some during the same year at $1.05.

Q. How about instruments?

A. The instruments are a little larger than the invoice prices here; they vary from time to time.

Q. How about wire?

A. That is at cost. I took the higher, 4¼ cents a pound, although some was bought at 4⅛ cents per pound; the instruments are based a little higher than some invoice prices here, the poles at $1.10, although some are invoiced at $1.05 and the cross-arms are figured at one-fourth their price.

The invoices last above referred to are attached to this deposition, as exhibits thereto, and are marked for identification "Exhibits E, F, G, H, I, J, K, L, M, N, O, P, Q and R."

By Mr. SLEVIN: Plaintiff's counsel objects to the introduction of the evidence on the ground that it is immaterial and irrelevant to the issues in this case.

Cross-examination by Mr. E. C. SLEVIN, attorney for the plaintiff:

Q. Mr. Cook, your company made the returns to the State board of equalization of property owned by the company in Missouri for taxation for the year 1899?

A. Yes, sir.

Q. How does that return made by the company at that time compare with "Exhibit D"?

A. Well, it is less.

Q. That is to say that "Exhibit D" is less than the amount returned to the State board?

By Mr. SMITH: It is just the reverse.

By Mr. SLEVIN:

Q. That is to say, the return to the State board is less than the total of "Exhibit D"?

A. (By witness:) Yes.

Q. Did your company make a return to the city of St. Louis of property for taxation by the city?

A. Yes, sir; assessed by the local board.

Q. That is exemplified in "Exhibit A" to your deposition?

A. Yes, sir.

59 Q. The property taxed in "Exhibit A" is not also taxed in "Exhibit D"?

A. No.

By Mr. SMITH: I will say that there is no contention here of double taxation.

A. (By witness:) No.

Q. How do you account for the discrepancy between the return made by the company to the State board, and your computation of the property as shown in "Exhibit D" to your deposition?

A. One is absolutely new material, and the other as it was at the time rendered; the deterioration.

Q. If then, you add the outside figure placed by you upon property of the character of tables, chairs, horses and wagons, etc., and of a character other than that returned by you to the State board of

equalization, you have given what in your judgment would be the cost price new of the entire plant of the company in the State of Missouri on June 1, 1898?

A. Yes, sir.

Q. Your return to the State board took into consideration the deterioration of this material by use?

A. Yes, sir.

Q. Can you state whether the company has at any time attempted to take any appeal from the action of the State board of equalization upon the assessment made by it for the year 1898?

A. No, sir; there was no appeal, and no other legal proceedings other than the defences that are now being made. Mr. Frankel, assistant superintendent of our company at St. Louis, and Mr. Smith, our attorney, appeared before the board, and what they did is shown in a certified copy of the proceedings that I hand the notary herewith, to be attached to my deposition as "Exhibit S."

The document last above referred to is attached as an exhibit to this deposition and marked "Exhibit S."

Mr. SLEVIN: Plaintiff objects to the introduction of the certified copy in evidence on the grounds that it is immaterial and irrelevant and irresponsive to the question asked.

60 Mr. SMITH: That is all.

Mr. SMITH: Do you wish*ed* these signed, or will you waive signature?

Mr. SLEVIN: We will waive signature.

Signature waived.

(Notary's certificate.)

Mr. SMITH: Without taking up time to read the exhibits attached to this deposition, I will offer them in their entirety.

EXHIBIT A.

State, School, and City Taxes for 1899.

City Book 12, bill 74.

Received of Western Union Telegraph Co.—residence: R. H. Bohle, mgr., 412 Pine St.—sixty-nine $\frac{81}{100}$ dollars, being the amount of State, school, and city taxes for the year 1899, in St. Louis city, on real estate as below detailed and on personal property.

City block.	Street or avenue.	Feet front.	Feet deep.	Addition.	Block.	Lot.	North.	East.	South.	West.	Limits.

Specified designation of taxes valuation.	Aggregate of assessed value.	Amount of taxes. Doll's.	Cts.	Mills.
State.	*Rev.*	*5*	*37*	
	Int.	*3*	*58*	
Revenue—0.15 cents on $100				
Interest—0.10 cents on $100	35.80			
Total—0.25 cents on $100				
Public school.				
General—0.40 cents on $100		14	32	
Total—0.40 cents on $100				
City.				
Municipal purposes—0.98 cents on $100				
Interest on valid indebtedness—0.30 cents on $100				
Public school library—0.02 cents on $100				
Total $1.30 on $100	Total.	46	54	
		69	81	

Approved:
T. P. COOK, *Supt.*

Personal property 35.80

35.80

Dec. 27, 1899.

CHAS. F. WENNEKER, *Collector*,
By L. ALT, *Deputy*.

61 EXHIBIT B.

No. 3407.

This receipt is not valid until countersigned by the city auditor.

KANSAS CITY, MO.,
OFFICE OF CITY TREASURER, 5, 23, '99.

To Western Union Tel. Co.:

Address: 7 and Main.

For taxes levied by said city for the year 1899 on personal property.

Form 18.

Voucher No. 102.

	Value. Doll's.	Taxes. Doll's. Cents.
	1,000	12.00
Rebate	.....	.72
Penalty	.....	.....
Penalty	.....	.....
		11.28

Received payment.

J. SCOTT HARRISON, JR.,
City Treasurer,
By SURALL, *Deputy.*

(Countersigned:)
AMOS R. CECIL,
City Auditor.

Across the face is the following: "Approved. T. P. Cook, sup't," and also "Paid, 1899. J. Scott Harrison, Jr., city treasurer."

EXHIBIT C.

Tax Levy, 1899.

General fund	$1.00	
Interest fund	.30	817
Sinking fund	.25	
On each $1.00 valuation	1.55	Original

62 This receipt must be signed by the auditor.

CITY TREASURER'S OFFICE,
ST. JOSEPH, MO., *May* 16, 1899.

Received from Western Union Telegraph Company the sum of 109.13 dollars in full of the taxes levied upon the following property by the city of St. Joseph for the year 1899, to wit:

Description.	Lot.	Bl'k.	Addition.	Valuation.	Tax. Doll's. Cts.	Total. Doll's. Cts.
Personal.....	...	...	45	$50	.78	
Merchants'.....	...	...	17	7,440	115.32	
						116.10

Form 18.
Voucher No. 101.

Approved.

T. P. COOK, *Sup't.*

Discount, 6 per cent..... 6.97

Total tax..... 109.13

Read notice on opposite side.

RICE D. GILKEY, *Treasurer.*
LINCOLN, *Deputy.*

T. R. ASHBROOK, *Auditor.*

EXHIBIT D.

Cost per Mile of New Poles Erected in 1-98, *Including Labor.*

30 poles, at $1.10	$33.00
Labor, erecting poles.....	21.40
Freight on poles (30) at 25c.....	7.50
Total, one mile of poles.....	$61.90

Cost per Mile of a New Eight-guage Iron Wire Erected in 1898 *on Poles, Including All Fixtures and Labor.*

1 mile No. 8 galvanized wire, 380 lbs. at .04¼c.		$16.15
¼ cost of 30 cross-arms, 6 feet, at 18c.		1.35
¼ cost of 60 bolts and washers, at .01.1c.....		.14
30 steel pins, at .02¾c.		.82
30 screw-glasses, at .02.69c.....		.80
2 lbs. tie-wires, at .04.5c.		.09
⅛ lbs. solder, at .11c.....		.02
63	Labor of foreman and men.....	3.40
	Freight on material.....	1.64
	Total, one mile of wire	$24.41

Instruments in use, State of Missouri, year 1898, No. sets 732, cost	$3,330.60
Duplex in use, State of Missouri, year 1898, No. sets 13, cost.....	869.18
Quadruplex in use, State of Missouri, year 1898, No. sets 61, cost	6,714.88
Repeaters in use, State of Missouri, year 1898, No. sets 33, cost.....	749.10
Wheatstone repeaters in use, State of Missouri, year 1898, No. sets 1, cost	396.25

Wheatstone recorders in use, State of Missouri, year 1898, No. sets 7, cost	525.00
No. cells battery in use, State of Missouri, year 1898, No. sets 4,266, cost	1,791.72
Cost of power plant, St. Louis	10,220.00
Cost of power plant, Kansas City	3,597.00
	$28,093.73

Western Union Plant in Missouri in 1898—*New.*

6,076 miles of poles, at $61.90	$376,104.40
23,763.34 miles of wire, at $21.40	580,159.76
Batteries, instruments, etc.	28,093.73
Total, new plant	$984,357.89

EXHIBIT E.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 49. Invoice No. 2322.

CHICAGO, *Ap'l* 27, 1898.

I have this day shipped to W. U. Tel. Co., care S. K. B., Sedalia, Mo., via. Wab., care M. K. & T. R., Hannibal, the following material for rep'rs of line M. K. & T. R. R.

64 Est. *Mo.* —. S. C. MASON, *Storekeeper.*

100 25-ft. 6-inch poles, $1.10 ..... $110.00

Wab. 30932.
From M. & Co., Beaver, M.

EXHIBIT F.

Supply dep't No., 5712. Sup't's No., 538.

Supply department, Western Union Telegraph Co., Chicago, Ill.

Invoice of Supplies Shipped to M., K. & T. R'y by Pac. X in — Bbls., 2 Boxes, — Cases, — Casks, — Pkgs.

Date, 4, 2, '98.

Packed by —— ——.
Checked by —— ——.

Check.	Articles.	Battery instruments.	Station-ery.	Miscella-neous.	Total.
18	Keys	.....	.....	.....	$12.60
13	Relays	.....	.....	.....	32.50
9	Sounders	.....	.....	.....	13.05
1	Box relay keys	.....	.....	.....	4.20
					$62.35

To W. U. Tel. Co., care S. H. Bullard, S. F., Sedalia, Mo.:

Please acknowledge receipt hereof when supplies are to hand and and also note condition, then return this to me.

T. P. COOK, *Sup't.*

Packages should be examined thoroughly for all articles noted; pens, pencils and other similar articles, when shipped in small quantities, are packed in small envelopes and should be searched for carefully. Receipt this invoice and return it to your superintendent. Articles received, and amount of the same taken this 5th day of April, 1898.

S. K. BULLARD,
D. Sup't Tel.

65 EXHIBIT G.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 374. Invoice No. 2057.

CHICAGO, 4, 14, 1898.

I have this day shipped to W. U. Tel. Co., care S. C. Kinsman, Moberly, Mo., via Wabash R. R., the following material for reconst. of line Moberly to Ottumwa.

Est. No. 8. S. C. MASON, *Storekeeper.*

500 25-ft. 6-inch poles, $1.10..... $550.00

Wab. 30814
" 32387
" 30924
" 31532
" 30858
} From Muller & Co., Spalding, Mich.

EXHIBIT H.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 49. Invoice 2351.

CHICAGO, 4, 26, 1898.

I have this day shipped to W. U. Tel. Co., care S. K. B., Sedalia, Mo., via Wabash, care M. K. & T., Hannibal, Mo., the following material for rep. of line M. K. & T. R. R.

Est. No. — S. C. MASON, *Storekeeper.*

100 25-ft. 6-inch poles..... $110.00

M. K. & T., 3886.
M. & Co., Compton, Mich.

EXHIBIT I.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 689. Invoice No. 1195.

66 CHICAGO, 3, 3, 1898.

I have this day shipped to W. U. Tel. Co., care R. H. Innes, S. Tel., San Antonio, Tex., via below, the following material for rep's of line S. A. & A. P. R'y.

Est. No. — S. C. MASON, *Storekeeper.*

200 25–6 poles, $1.05 ..... $210.00

D 10854
" 10083

From Monroe, Mich., L. S. & M. S. R'y. Care Wabash R'y, Toledo, O. Care M. J. & T. R'y, Hannibal, Mo. Care S. A. & A. P., Waco, Tex.

EXHIBIT J.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 32. Invoice No. 1583.

CHICAGO, 3, 23, 1898.

I have this day shipped to W. U. Tel. Co., Sedalia, Mo., the following material for rep's of line Mo. Pac. R'y.

S. C. MASON, *Storekeeper.*

800 6-ft. arms, 18c. $144.00

Sup't Cockey's No. 1745.
Storekeeper's No. 4227–1583.

EXHIBIT K.

Supply department, Western Union Telegraph Co., western division.

District No. 2.

Requisition No. 723. Invoice No. 1131.

CHICAGO, 3, 1, 1898.

I have this day shipped to W. U. Tel. Co., Sedalia, Mo., the following material for rep's of line Mo. Kan. & Texas railway.

500 6-ft. arms, 18c. $90.00

Sup't Cockey's No. 27078.
Storekeeper's No. 4118.

67 EXHIBIT L.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 118. Invoice No. 1396.

CHICAGO, 3, 14, 1898.

I have this day shipped to W. U. Tel. Co., care H. C. Sprague, sup't tel., Kansas City, Mo., via Wab. R'y, the following material for rep's of line K. C. F. S. & M. R'y.

S. C. MASON, *Storekeeper.*

925 lbs. No. 8 wire, 4.1	$39.03
580 lbs. No. 9 wire, 4¼	24.65
215 lbs. No. 11 wire, copper, 13⅛	28.22
1000 glass, 2.69	26.90
3000 steel pins, 2.75	82.50
200 Ferm pins, 3.60	7.20
1000 bolts & wash., 1.50	15.00
150 lbs. iron ties, 4½	6.75
25 lbs. copper ties, 14⅛	3.53
50 lbs. solder, 7.60	3.80
10 solder'g sticks, 12	1.20
100 14-inch mch. B., 1.60	1.60
100 14-inch eyeb., 5½	5.50
50 6-inch eyeb., 5	2.50
40 stirrup irons, 7½	3.00
150 19c. pipe straps, 12	.72
150 10c. pipe straps, 12	.48
For'd	$252.58

EXHIBIT M.

Supply department, Western Union Telegraph Co., western division.

68 District 2.

Requisition No. 374. Invoice 2166.

CHICAGO, *Ap'l* 18, 1898.

I have this day shipped to Wab., care G. C. K., Moberly, Mo., via Wab., the following material for recon. of line Moberly to Ottumwa. Est. 8.

S. C. MASON, *Storekeeper.*

200 25-ft. 6-inch poles, $1.10	$220.00

Wab. 32252.
" 32535.

From Muller & Co., Beaver, Mich., G. C. Kinsman, sup't.
Dec. — ——.

EXHIBIT N.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 374. Invoice 2253.

CHICAGO, 4, 23, 1898.

I have this day shipped to G. C. Kinsman, S. T. Wab., Moberly, Mo., via Wab., the following material for reconst. of line Moberly to Ottumwa.

Est. No. 8. S. C. MASON, *Storekeeper.*

195 25-ft. 6-inch poles, $1.10..... $214.50

Wab. 30796.
" 14377.
M. & Co.
Ship- from Brampton, Mich.

EXHIBIT O.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 726. Invoice No. 2167.

CHICAGO, 4, 16, 1898.

I have this day shipped to W. U. Tel. Co., care S. K. Bullard, sup't, Denison, Tex., via Wab., care M. K. & T., Hannibal,
69 Mo., the following material for rep'rs of line M. K. & T. R. R.

S. C. MASON, *Storekeeper.*

100 25-ft. 6-inch poles..... $110.00

Wab. 32531.
From Muller & Co., Spalding, Mich.
S. K. Bullard, sup't.

EXHIBIT P.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 139. Invoice No. 2364.

CHICAGO, 4, 28, 1898.

I have this day shipped to W. U. Tel. Co., care L. F. Sheldon, s't, Sedalia, Mo., via Wab., care Mo. Pac., St. Louis, Mo., the following material for rep'rs of line Mo. Pac. R. R.

S. C. MASON, *Storekeeper.*

100 25-ft. 5-inch poles..... $110.00

Wab. 30891.
From Mueller & Co., Spalding, Mich.

EXHIBIT Q.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 726. Invoice No. 2252.

CHICAGO, 4, 21, 1898.

I have this day shipped to W. U. Tel. Co., care S. K. Bullard, Denison, Tex., via Wab., care M. K. & T. R'y, Hannibal, the following material for rep'rs of line M. K. & T. R. R.

S. C. MASON, *Storekeeper.*

100 25-ft. 6-inch poles..... ..... $110.00

Wab. 30709.
M. & Co.
Ship'd from Beaver, Mich.

70 EXHIBIT R.

Supply department, Western Union Telegraph Co., western division.

District 2.

Requisition No. 129. Invoice No. 2366.

CHICAGO, 4, 29, 1888.

I have this day shipped to W. U. Tel. Co., care L. F. Sheldon, A. S. T., Sedalia, Mo., via Wab., care Mo. Pac., St. Louis, the following material for rep's on line Mo. Pac. R. R.

S. C. MASON, *Storekeeper.*

100 25-ft. 6-inch poles..... $110.00

Wab. 30757.
From Mueller & Co., Spalding, Mich.

EXHIBIT S.

Western Union Telegraph Company.

Elencious Smith, attorney.
George J. Frankel, assistant general manager.

Mr. SMITH: If the board please, I desire to simply say a few words with respect to the return of the Western Union Telegraph Company. The return made this year, separated for the different counties, as required, is on the poles 6,075.98 miles at fifty dollars per mile, $303,799; and 23,764.34 miles of wire, at ten dollars per

mile, $237,673.40—a total of $541,472.40. My recollection of the statute under which the board of equalization assesses telegraph and telephone and bridge property is that it should be the duty of the board to fix the value of the real and personal property and the franchises, it being one of the few statutes, perhaps the only one, in which the franchise is specifically mentioned. Now it is, I assume, known to the board that the Western Union Company is not a Missouri corporation, and therefore we cannot avail ourselves of any of the franchises given by the State of Missouri to telegraph companies organized under the laws of the State. The original act of 1855 gave all telegraph companies the right to place their poles
71 along the streets, highways and roads of the State, but that was changed subsequently, it is immaterial when, because it has been the law for many years, so as to limit that franchise, which is a most important one, to telegraph companies organized under the laws of the State of Missouri. And when we had our contest with the city of St. Louis, I found that we could not avail ourselves of that right, and the Supreme Court of the United States decided that while as an instrument of interstate commerce, existing under Federal incorporation, we must be permitted to go into the various States and cities, yet we were bound to pay whatever charge was reasonable, and the only way, I may say for the information of the board, we escaped that payment for the time being was by an absolute showing that of our fourteen hundred poles in the city of St. Louis, nine hundred were actually used by the city, and in many instances, to a greater extent than the Western Union used them itself; that the cost to us of maintaining those poles, which we had to do for the city under the contract rate, was really almost as much as the Western Union itself got from it, and therefore they said, "If you maintain that service under a contract rate with the city to use every pole you have, and the top cross-arm, which is the choice arm, it cannot say to you, 'You shall pay for using the streets and at the same time maintain this service at this enormous cost.' But the moment the city takes its wires from that pole, or series of poles, it then has the right to charge us for occupying that space, any sum that is reasonable." I apprehend this is one of the most valuable franchises that a telegraph company in Missouri can have, because the legislative act permitting all telegraph companies to put up their poles, etc., along the streets and highways, would, in my judgment, mean, without question—for instance, if I form tomorrow the Jefferson County Telegraph Company, I would have a right to do that without any of the municipalities being allowed to charge me for that franchise given by the act of the State. There has, of course, arisen out of
72 this Federal grant, a corresponding burden, which, during the late war, was a very great one. The contract of the Western Union with the Government, under act of 1866, with the Government of the United States, is that they shall give priority to all governmental messages; that they shall send them at such rates as may be prescribed by the Postmaster General, and that the United States

shall have at any time the right of purchasing the Western Union at a price fixed by arbitration, so that, if the United States chooses to exercise this right, it could acquire the Western Union plant under that sort of valuation. I mention those facts merely to call the board's attention to the subject of the franchise because while we have the ordinary police protection and things are incidental to the State government, yet on the other hand, I believe, so far as I personally know, it has been the disposition of the company to pay its fair proportion of the taxes. Now we have made up a list, if the board please, of the items that go into a mile of wire, because that is the way the calculations seem to be made. The actual cost of a mile of poles, thirty poles to the mile, is $39.91, together with the arms, bolts, washers, pins and staples. Those figures are taken from the actual invoices, poles as they are made to us. Those poles and material are obtained from other places, as a rule, so of course there are certain freight charges to get them to Missouri. The freight on the poles and material amount to, on a mile of poles, $8.46. The labor of erecting them averages seventy-five cents—wire, glasses, and solder, $17.06, making the total cost $20.72. The average cost for a complet mile of wire, labor, freight, etc., would be $94.00. Now we have in Missouri, 6,075.98 miles of poles, and 23,767.34 miles of wire. If all that property was duplicated today, so as to make it an absolutely new plant, it can be done for $938,253.93, to which should be added about $28,000, the cost of the large offices at either end. Now the board's assessment last year against us was $450,000 in excess of that figure; in other words,
73 substantially four hundred and pretty near sixty thousand dollars our actual figures show we could reconstruct our entire system for today, and I think we are justified in saying that we feel that that figure is a greater valuation than ought to be imposed upon the physical property, because, as is well known, the company is a very old one. I know my testimony in the city case developed that many of the poles along Third street had been there sixteen years, and I believe the average life of a pole is about twenty years. In fixing the figure at $541,000, which I think is substantially sixty per cent. of the cost of a new plant, why I think that Mr. Cook was giving a figure that would certainly not be below the actual value. I do not know myself in the sense of second-hand material but that it would fairly represent the actual cost of the property, less whatever the average depreciation would be, and that $450,000, if we assume that the system is worth now what it was then, why the assessment of the board last year would exceed the cost of a new plant in the State of Missouri by about $450,000. I would like to leave for the information of the board this memoranda, which will show you in detail what the actual cost of material, etc., is. That is taken from our books.

Which said statement is as follows:

Present Cost per Mile of Telegraph Line, Poles, and Wires.

30 poles at $1.10	$23.00
30 arms, 18c	5.40
60 bolts and washers, .011	.66
30 pins, .02¾	.82
1 lb. staples, .03	.03
	$39.91
Freight on poles and materials	8.46
Labor, foreman and men	25.00
	$73.37
74 1 mile No. 8 wire, 380 lbs., at 4¼c	16.15
30 glasses, at $2.69	.80
2 lbs. ties, at 4½c	.09
⅛ lb. solder, at 11c	.02
	$17.06
Freight on wire and material	1.16
Labor, foreman and men	2.50
	$20.72

In the State of Missouri, we have 6,075.98 miles of poles, and 23,767.34 miles of wire.

This property, brand new, could cost $938,253.93.

For the year 1898 the total assessment against this company was $1,392,506.07.

Total taxes paid, $18,745.13.

STATE OF MISSOURI,
Office of State Auditor.

I, James M. Seibert, State auditor of the State of Missouri, do hereby certify that the above and foregoing is a true, full and complete copy of the remarks made before the State board of equalization by Mr. E. Smith respecting the assessment of the property of the Western Union Telegraph Company for taxes of 1899, as fully as the same remains on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State auditor. Done at office in the city of Jefferson, this 11th day of June, 1900.

[SEAL.]

J. M. SEIBERT,
State Auditor.

The defendant here rested its case.

And the foregoing was all the evidence offered in the case.

And thereupon the plaintiff asked the court to declare the
75 law as follows:

1. The court declares the law to be that if it appears from

the pleadings and the evidence that this is a suit against defendant for the collection of taxes upon an assessment made by the State board of equalization and assessment, and that no question is made upon the legality of any of the proceedings except only the assessment made by the said State board, and if it appears that said State board assessed and equalized the property of defendant in Missouri, after duly considering the evidence at a hearing in which defendant participated, and made the assessment as follows, to wit:

6,075.98 miles of poles, at $71.00 per mile	$434,432.57
23,767.34 miles of wire, at $22.00 per mile	523,336.82
2,375 instruments at $5.70 each	13,537.50
All other property	856,400.56
Total	$1,827,725.45

And if it appears further from the answer of the defendant that at the date of said assessment it owned in the State of Missouri the number of miles of poles and wires and the number of instruments above set forth and also other property, then the finding and judgment must be for the plaintiff for the whole of the taxes sued on.

2. The court declares the law to be that the assessment and valuation made by the State board upon the poles, wires and instruments owned by defendant in this State is final and conclusive and is not subject to review or attack in this suit.

3. The court declares the law to be that the assessment and valuation made by the State board upon all other property owned by the defendant in the State of Missouri is final and conclusive and is not subject to review or attack in this suit.

4. The court declares the law to be that if it appears from the evidence that in arriving at the value of all other property owned by the defendant in the State of Missouri and subject to taxation, the said State board considered the facts set out in the returns and statement of the company, and all evidences of value, and
76 matters bearing upon the question of the value of the property of the company, cost of construction and equipment, the location thereof, its traffic and business, the market and par value of its stocks and bonds, the gross receipts and net earnings, and the franchise owned by said company, and the value thereof; and also evidence concerning the value of the cost of construction of the telegraph line, the market value and the par value of the stocks and bonds, gross receipts and net earning power, the franchise and value thereof, and fixed the value of all other property after such consideration at the sum of $856,400.56, then the finding of said State board is conclusive and is not subject to review or attack in this suit, and the judgment must be for plaintiff.

5. The court declares the law to be that all the property, real and personal, including the franchise owned by defendant telegraph company, being in and operated in the State of Missouri, is subject to taxation in said State of Missouri, for State, county, municipal and other local purposes to the same extent as the property of private persons.

Which declaration number 2 the court gave, over the objection of the defendant, and to which ruling of the court in giving said declaration so numbered the defendant, by its counsel, at the time duly excepted and still excepts.

The court refused to give declarations numbered 1, 3, 4 and 5, to which ruling of the court in refusing to give said declarations of law so numbered, and each of them, the plaintiff, by its counsel, at the time duly excepted and still excepts.

And thereupon the defendant asked the court to declare the law as follows:

1. From the evidence, the court finds that the third item of the tax bill sued on designated as "on all other property" was intended to embrace the right of the defendant to operate a telegraph system along and over the post-roads of the United States, under a
77 contract between the defendant and the United States, by which contract the United States was given the precedence in the transmission of all messages, and which gave to the United States the right to establish the charges to be paid for such service, and by it the United States is given the right to purchase said system, at any time, at a price to be fixed by a board of arbitrators. On this state of facts, the court declares the law to be that as to said third item the plaintiff cannot recover.

2. The court declares the law to be that a franchise derived from the United States giving to the defendant the right to construct and operate its telegraph system along the post-roads of the United States is not subject to taxation by the State of Missouri.

3. The court declares the law to be that when the defendant accepted the terms of the act of Congress set out in defendant's answer, and undertook and agreed to place its poles and wires along and over the post-roads of the United States, in consideration of which the defendant agreed to give the United States precedence in the transmission of its messages at such price as the United States might name and further agreed to sell its telegraph system at any time to the United States on such terms as a board of arbitrators might determine, the defendant then became an agency of the United States and such privilege or franchise cannot be assessed and taxed by the State of Missouri.

4. The court declares the law to be that all property ought to be assessed and taxed in proportion to its value and that such assessment and taxation should be uniform. The court finds that it is the established rule in this State to place for taxing purposes a value on property of about forty per cent. of its actual value, but that in assessing the property of defendant named in the first and second items of the tax certificate sued on in this case, a value was placed thereon greatly in excess of forty per cent. On this state of facts the court declares the law to be that as to such excess the
78 plaintiff cannot recover.

Which declarations numbered 1, 2 and 3 the court gave over the objection of the plaintiff, to which ruling of the court in giving said declarations of law so numbered, and to the giving of

each of them, the plaintiff, by its counsel, at the time duly excepted and still excepts.

The court refused to give said declaration of law numbered 4, to which ruling of the court in refusing to give said declaration so numbered, the defendant, by its counsel, at the time duly excepted and still excepts.

And afterwards, to wit, on the 22nd day of January, 1901, the court, under the pleadings, the evidence and the declarations of law given as aforesaid, gave judgment as follows:

"The court finds the fact to be from the evidence and the pleadings that the defendant owned in the State of Missouri, at the time of the said assessment, the poles, wires and instruments of the value hereinbefore set forth.

"And the court finds the fact to be from the evidence that in valuing 'all other propety' of defendant the State board took into consideration the franchise of defendant company, and the court finds under the law, and so declares, that the franchise of defendant company is not subject to valuation and taxation and as to this item of the above-named valuation the court finds the issues for the defendant.

"It is therefore considered, ordered and adjudged by the court that the plaintiff recover of the defendant for its taxes for the year 1899 upon the assessment as made by the State board of equalization against the poles, wires and instruments of the defendant as above set forth. The items of said tax and the apportionment for the county of Jackson being in the following amounts:

79	For State purposes	$117.40
	For county purposes	164.37
	For road purposes	20.54
	For general county-school purposes	214.95
	For school-building purposes	1.74
	For other school purposes	11.04
	For Kansas City municipal purposes	57.13
	For Independence municipal purposes	14.72
	For Kaw township railroad purposes	1.18
	For Blue township railroad purposes	2.75
	Total	$605.82

together with interest upon the total amount so found to be due from the defendant at the rate of one per cent. per month from the first day of January, 1900, to date, amounting to $—.

"And also for two per cent. of the gross sum found to be due from defendant for the commissions of the collector of the revenue; and also a reasonable fee for the attorneys of the plaintiff, to be hereafter determined by the court and taxed as costs against the defendant.

"It is further found by the court that the gross sum due from the defendant is a first lien against the property of the defendant in the county of Jackson and State of Missouri, and it is therefore ordered

and adjudged by the court that the plaintiff recover of defendant the amount as above mentioned for its taxes for the year 1899 and for costs and interest thereon, and that special execution be levied out of the property of the defendant as above set forth."

And afterwards, and within four days, to wit, on the 24th day of January, 1901, the plaintiff filed its motion for a new trial in the words and figures following:

Motion for a New Trial.

Now on this 24th day of January, 1901, comes the plaintiff
80 in the above-entitled cause and moves the court to set aside the verdict and judgment rendered in said cause on the 22nd day of January, 1901, and to grant plaintiff a new trial therein, for the following reasons:

1. The verdict in said cause is against the evidence, against the weight of the evidence, and against the law under the evidence.
2. The verdict should have been for the plaintiff for the total amount claimed.
3. The court erred in admitting incompetent, immaterial and irrelevant evidence offered by the defendant over the objection of plaintiff.
4. The court erred in the declarations of law given at the instance of the defendant.
5. The court erred in the declarations of law given on its own motion.
6. The court erred in refusing the declarations of law asked by plaintiff.
7. The court erred in admitting any evidence over the objection of the plaintiff to sustain the second and third allegations in the defendant's answer.

Which motion for a new trial was on the 26th day of January, 1901, overruled by the court. To which ruling of the court the plaintiff at the time excepted.

And also within four days, to wit, on the 24th day of January, 1901, the defendant filed its motion for a new trial in the words and figures following:

Now on this day comes the defendant in the above-entitled cause and moves the court for an order setting aside the judgment and granting it a new trial for the following reasons, to wit:

(1.) The uncontradicted evidence shows that the rule for assessing property generally in this State is on a basis not to exceed forty per cent. of its actual value, while the property of the defend-
81 ant was assessed by the State board of equalization on a basis of full actual value, by which the defendant was denied the equal protection of the law and was in violation of the Constitution of the United States as provided by the fourteenth amendment thereto. And the court erred in not reducing the amount of such valuation.

(2.) The court erred in refusing the fourth instruction asked by defendant.

(3.) The court erred, against defendant's objections, in excluding legal and competent evidence offered by the defendant as to the actual value of defendant's property in this State.

(4.) The court erred in giving the instructions asked by the plaintiff.

Which motion for a new trial was on the 26th day of January, 1901, overruled by the court: To which ruling of the court the defendant at the time duly excepted.

And afterwards, to wit, on the 26th day of January, 1901, the plaintiff filed affidavit for appeal in the words and figures following:

Affidavit for Appeal.

STATE OF MISSOURI, } ss:
County of Jackson, }

Now on this 26th day of January, 1901, being at the regular January term of the court, comes the plaintiff in the above-entitled cause by Chris Gottleib, the relator therein, and the said Chris Gottleib, being duly sworn, upon his oath says that the appeal prayed for by the plaintiff is not made for vexation or delay, but because he considers the plaintiff aggrieved by the judgment and decision of the court.

CHRIS GOTTLEIB, *Relator.*

Subscribed and sworn to before me this 26th day of January, 1901.

H. M. STONESTREET, *Clerk,*
[SEAL.] By H. O. PAYNE, *D. C.*

82 And also, to wit: on the 26th day of January, 1901, the defendant filed affidavit for appeal in the words and figures following:

Now comes the defendant herein and prays the court for an appeal from the verdict and judgment heretofore rendered herein to the supreme court of Missouri.

DICKSON & SMITH,
KARNES, NEW & KRAUTHOFF,
Attorneys for Defendant.

STATE OF MISSOURI, } ss:
County of Jackson, }

J. V. C. Karnes, of lawful age, on his oath deposes and says he is one of the attorneys for the defendant in the above-entitled cause; that this appeal is not made for vexation or delay, but because affiant believes that the appellant is aggrieved by the judgment and decision of the court.

J. V. C. KARNES.

Subscribed and sworn to before me this 26th day of January, 1901.

My commission expires June 13, 1902.

A. F. SMITH,

[SEAL.] *Notary Public, Jackson County, Mo.*

Wherefore the said plaintiff and defendant pray the court to settle this their bill of exceptions to all and singular the acts, rulings and orders of said court in the premises, and that the same may be signed, sealed and made a part of the record herein, which is now accordingly done.

Given under the hand and seal of the Honorable John W. Henry, judge of division No. 4 of said circuit court, before whom the said proceedings were had, this 23rd day of February, 1901.

JNO. W. HENRY, [SEAL.]
Judge of the Circuit Court, Div. No. 4.

The foregoing bill of exceptions approved as correct this 19th day of February, 1901.

83 H. M. MERIWETHER,
Attorney for Plaintiff.
DICKSON & SMITH,
KARNES, NEW & KRAUTHOFF,
Attorneys for Defendant.

Opinion of Judge Henry of the Circuit Court of Jackson County, Mo., in the Case of State of Missouri ex Rel. Collector vs. Western Union Telegraph Company.

The Western Union Telegraph Company was incorporated under the laws of the State of New York, and, after it had been operating under its charter from that State the Congress of the United States passed an act providing that, if the company would accept the provisions of the act it should have the privilege of setting its poles and stretching its wires on and along any postal road of the United States. By the provision of the act, the Postmaster General of the United States was authorized, on the first of January of each year, to prescribe the rates for the transmission of telegrams by Government officials, and that these telegrams should have precedence over all other messages. It was further provided that the company should sell its line to the Government, at the option of the Government, at a price to be fixed by arbitrators to be selected as provided by that act.

By the statute of Missouri the franchises of telegraph companies are made taxable for State, county and municipal purposes.

The principal and controlling question in this case is, whether the franchise of the Western Union is taxable under that law, the attorneys for the company contending that inasmuch as it derived no franchise from the State, but its right to place its poles and wires on and along the postal roads of the United States, in this State, and conduct its business here was derived from the Government of the

United States and is a Government agency, under the act of Congress, *supra*, the State cannot impose a tax on the franchise.
84 It is an important question, and has been ably and plausibly argued by the counsel on both sides.

It is conceded that a franchise is property,—often the most valuable property of a corporation, more valuable than its corporeal possessions.

The mere fact that a franchise is derived from the Government of the United States would not, I should think, exempt it from taxation by the State in which it is exercised.

The title to all the real estate in Missouri was derived from the General Government. Thousands of acres are owned by parties who received their land as a bounty from the Government for military services, or others who derive their titles from them or their heirs or grantees, yet it would not be contended that such lands are non-taxable by the State because originally derived from the Government of the United States.

If the franchise of the Western Union is non-taxable, it must be on the sole ground that it is a Government agency, for on no other ground can the position that it is non-taxable by the State be maintained.

In the celebrated leading case of McCullough against Maryland, it was held by the Supreme Court of the United States that a branch of the Bank of the United States, located at the city of Baltimore, could not be taxed by the State of Maryland, because it was a Government agency, created by the Government of the United States for its own convenience and purposes, and that to recognize the right of the State to impose a tax upon it would be to concede a power in the State to destroy or so cripple and hamper the branch bank as to defeat the end of its creation by the General Government.

The difference between the facts of that case and this is that the Government of the United States did not incorporate the Western Union, which obtained its charter from the State of New York, and was actively engaged in transacting business
85 under its charter before the act of Congress, *supra*, was created.

Does the fact that under that act of Congress the Government had an arrangement, a contract, with the Western Union for the transmission of its messages, bring it within the principle of the case of McCullough against Maryland? If so, then it must be held that the State of Missouri cannot levy a tax upon its franchise; and every railroad, express company, and telegraph company in the United States, by contracting with the Government for the transportation of troops, munitions of war, or other Government property, or the transmission of Government messages over the telegraph lines, can withdraw all their franchises from taxation by the State within which they are operated. If this were a new question, I should incline to hold that the franchise is taxable by the State.

It is property, the most valuable property owned by the Western Union. Without the franchise, its lines, the poles and wires would

have no value except what they would be worth as raw material, but by reason of their right to use them in the transaction of their business their value is greatly enhanced.

That the franchise was created by the General Government cannot exempt it from taxation by this State, unless it is owned by the General Government or unless the Government by its contract with the Western Union and by granting to that company its franchise to operate its line in the State has made it a Government agent. The decisions of the courts present several anomalies and apparent contradictions.

If the State cannot tax the franchise, which is property, because the Western Union is a Government agency, upon what principle can it impose a tax on the tangible property of the company, its poles, wires and instruments, which it is conceded the State may tax? The visible tangible property is that which is directly employed by the company in serving the Government under this contract.

If the State could cripple and destroy this agency and
86 thus seriously incommode the Government by taxing its franchise, it might accomplish the same result by taxing its tangible property; and yet in The Western Union Telegraph Company against Mass., 125 U. S., 125, it was virtually held that the franchise of the company might be considered as an element of value in estimating the value of the other property of the Western Union Telegraph Company.

It strikes me that the argument of the defendant would exempt from State taxation not only the franchise, but all the other property of the defendant.

But I cannot set up my opinion against that of the Supreme Court of the United States, which in the Pensacola Telegraph Company against the Western Union Telegraph Company, 96 U. S. 1, held that the powers given to the Western Union Telegraph Company by the act of Congress of July 24, 1866, cannot be obstructed by State legislation, and that the power of a State to tax its franchise would enable the State to place obstructions in the way of its usefulness. The franchise granted the Western Union by the State of New York conferred no right upon the company beyond the limits of that State.

The act of Congress of 1866 gave that company all the rights it has in Missouri, and may be regarded as a new and distinct charter to the company by the Government for Government purposes so far as its existence in this State is concerned. It is a Government agency under the decisions of the Supreme Court of the United States above cited.

In California *v.* Pacific R. R. Company, 127 U. S. 1, the facts of one branch of the case were that the Southern Pacific R. R. Company was a corporation existing under the laws of California, but received an additional franchise from the Government of the United States, and on this franchise the State attempted to impose a tax. The court said:

"Assuming then that the Central Pacific railroad has received the

important franchise referred to by grant of the United States,
87 the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away nor destroy or abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situate within the State. This is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot."

The Central Pacific, it is true, derived its charter from the Government of the United States, but the court in the same opinion, held that the franchise granted by the Government of the United States to the Southern Pacific was not subject to taxation by the State of California.

In the case at bar the right to plant its poles, stretch its wires and transact its business in this State is clearly a franchise; if not, it has no franchise to tax, and if a franchise, it was granted by the Government of the United States, is an agency of the United States as held by the Supreme Court of the United States, and under the foregoing decision of that court is not subject to State taxation.

In San Francisco against The Western Union Telegraph Company, 96 Cal., 140, the precise question involved in this case was carefully considered by the supreme court of California, and decided favorably to the Western Union without a dissent. Other courts have held the contrary, but as this case, if as vigorously contested as the importance of the question involved would justify, must ultimately be determined by the Supreme Court of the United States, I feel constrained to follow that rather than the State court whose opinions are not in harmony with those of the Supreme Court of the United States.

The State board of equalization placed a value on the
88 defendant's telegraph line, its poles, wires and all other property not included in that which the law requires the company to give in to the county assessor, and then fixed the value of all other property including and specifying the franchise. In fact, as disclosed by the testimony in the case, there was no other property except the poles, wires and instruments and that which had already been listed with the county assessor. It was in effect an attempt to tax the franchise as distinct from the visible property, but whether this is so or not the entire assessment as to the franchise and the other property, as classified by the State board of equalization, must fall to the ground. For if the franchise is not subject to taxation by the State, and there was other property than that specified in the first class of property valued by the board, the assessment of the franchise and such other property in gross, without a separate valuation of the franchise and the other property, *inviolates* the entire assessment as held by the Supreme Court of the United States. It follows that the judgment must be for defendant on that item of plaintiff's demand.

STATE OF MISSOURI, } ss:
County of Jackson, }

I, H. M. Stonestreet, clerk of the circuit court within and for the county and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the opinion of Judge Henry in the cause entitled State of Missouri *ex rel.* collector, plaintiff, against Western Union Telegraph Company, defendants, No. 38998, as the same now appears of record and on file in my office.

In witness whereof, I hereunto set my hand and affix the seal of said circuit court, at office in Kansas City, this twenty-sixth day of January, A. D. 1901.

[SEAL.] H. M. STONESTREET, *Clerk.*
D. M. M'CLANAHAN, *D. C.*

89 And afterwards to wit, on the 26th day of March, 1901, the further following proceedings were had in said cause, viz.

STATE *ex Rel.* CHRIS. GOTTLEIB, Resp., }
v.
WEST. UN. TEL. CO., App. }

Now at this day, the court having fully considered and understood the motion this day filed to advance this cause on the docket, doth order that said motion be sustained, and that this cause be set for hearing at the next call of cases in court in banc.

Which said motion to advance is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1901.

STATE OF MISSOURI *ex Rel.* CHRIS GOTTLEIB, Collector, Appellant, }
vs.
WESTERN UNION TELEGRAPH COMPANY, Appell*ant.* }

Motion to Advance Cause.

Now on this day comes the defendant herein and moves the court to advance the above-entitled cause upon the docket of this honorable court, and set the same for hearing before the court in banc at as early a date as may suit the convenience of the court, and for grounds of such motions says:

(1.) This is an action by the State of Missouri at the relation of Chris Gottleib, collector of the revenue for Jackson county, Missouri, against the Western Union Telegraph Company. The object
90 of the suit is to recover the State, county, school, municipal and other taxes levied against the Western Union Telegraph Company for the year 1899. (Petition, Abstract, pages 1 and 2.)

(2.) It appears that the State board of equalization on July 25, 1899 assessed the property of the Western Union Telegraph Com-

pany for taxation in that year at $1,827,727.45, distributed as follows:

6075.98 miles of poles at $71.50 per mile.....	$434,432.57
23767.34 miles of wire at $22.02 per mile.....	523,356.82
2375 instruments at $5.70 each.....	13,537.50
All other property.....	856,400.56
Total.....	$1,827,727.45

(Abstract, page 41.)

It appears that said property is distributed among one hundred of the counties of the State of Missouri and the city of St. Louis. (Abstract 42–47.) The taxes for State purposes alone on this assessment, being fifteen cents for revenue and ten cents for interest, amount to $4,569.31. An action similar to the case at bar is pending in all of the said one hundred counties of the State of Missouri, and the city of St. Louis, which said actions are awaiting the determination of this cause.

(3.) The defendant further says that by its answer two defenses are made to the taxes levied as above stated. (Answer, Abstract, pages 3–12.) The first defense is as to the physical property of the company, the poles, instruments and wires, being the first three items above set out, the assessment was void, or at least excessive, because not made upon the same basis or percentage of value as that upon which other property was assessed. In other words, the said poles, instruments and wires were assessed at more than the cost of replacement with new material, when other property of the State of Missouri was being assessed at only forty (40) per cent. of its
91 fair value. As to this defense, the trial court found against the defendant, and the defendant is appealing from that finding.

The second defense is that the items set forth as "all other property," $856,400.56, are the right of the Western Union Telegraph Company to operate a telegraph system along and over the post-roads of the United States under a contract between the defendant and the United States, by which contract the United States was given precedence in the transmission of all messages, and which gave to the United States the right to establish the charges to be paid for such service, and by which the United States is given the right to purchase said system at any time, at a price to be fixed by a board of arbitrators.

As to this defense the finding of the court was for the defendant, and the plaintiff is appealing from that finding.

(4.) Defendant further states that the State board of equalization at its meeting in the year 1900 assessed the property of the defendant for taxation for State, county, municipal, school and other purposes, at the sum of $1,827,727.45, and that said board has organized and is about to hold its sessions in the year 1901, and it is a matter of great importance not only to the defendant in the case at bar, but to the State of Missouri and its various governmental divisions, that

the questions presented by the cross-appeals in the case at bar should be speedily and promptly determined.

All of which is respectfully submitted.

DICKSON & SMITH,
KARNES, NEW & KRAUTHOFF,
Attorneys for Western Union Telegraph Company.

The undersigned, attorneys for the State of Missouri *ex rel.* Chris Gottlieb, collector, join in the above and foregoing motion,
92 and do ask the court to advance this cause for hearing before the court in banc at as early date as is convenient for the court.

HUNTER M. MERIWETHER,
Attorney for State ex Rel. Collector.

And afterwards, to wit, on the 26th day of April, 1901, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* CHRIS GOTTLEIB, Resp.,
v.
WEST. UN. TEL. CO., App.

Come now the said parties by attorneys, and after argument herein, submit this cause to the court.

And afterwards to wit, on the 3rd day of December, 1901, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* CHRIS GOTTLEIB, Collector, Plaintiff, Appellant,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant, Appellant.
} Appeal from Jackson County Circuit Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson county circuit court rendered, be in all things affirmed and stand in full force and effect on the defendant's appeal herein; and that the said plaintiff recover against the said defendant his costs and charges herein expended, and have therefor execution. It is further considered and adjudged by the court that the judgment aforesaid, in form aforesaid, by the said Jackson county circuit court rendered, holding that the tax assessed against "all other property at $856,400.56" to be unlawful, be reversed, annulled and for naught held and esteemed; that the said plaintiff be restored to all
93 things which he has lost by reason of the said judgment; and that a judgment be entered here in favor of said plaintiff for the sum of $1027.22, back taxes for the year 1899, with interest thereon from the first day of January, 1900, at the rate of one per

cent. per month. It is therefore considered and adjudged by the court, that the said plaintiff recover of the said defendant for its taxes for the year 1899, the sum of one thousand and twenty-seven dollars and twenty-two cents ($1027.22), together with interest upon said amount so found to be due from the said defendant, at the rate of one per cent. per month from the first day of January, 1900, to date, amounting to the sum of — dollars; and that the said plaintiff recover against the said defendant his costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, viz:

In the Supreme Court of Missouri, in Banc, April Term, 1901.

STATE OF MISSOURI *ex Rel.* CHRIS GOTTLEIB, Collector, Plaintiff and Appellant,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant and Appellant. } No. 10573.

This is an action at law by the collector of Jackson county to recover $1027.22 back taxes for the year 1899.

The answer contains two defences; 1st, that the State board of equalization intentionally discriminated against defendant in assessing its property at its full value, while other property in the State is only assessed at from thirty-five to forty per cent. of its value; and 2nd, that the assessment as to the item "all other property, $856,400.56," is an assessment on its franchise, and that the only franchise it exercises in this State is derived from an act of Congress approved July 14th, 1866 (U. S. Stats. at Large, 1865–'7, pp.
94 221–'22), which constitutes defendant a governmental agency, and an instrument of foreign and interstate commerce, and that under the Constitution and laws of the United States the board of equalization was without authority to impose that item of taxes.

The record discloses the facts to be that the State board of equalization, whose duty it is under the law (section 9387 R. S. 1899) to assess all property, real and personal, "including franchises," of telegraph companies, made the following assessment of defendant's property on the 25th of July 1899:

"STATE OF MISSOURI, }
Office of State Auditor. }

Be it remembered that heretofore, to wit: on the twenty-fifth day of July, 1899, the following among other proceedings were had by the State board of equalization, viz:

The State board of equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidences of value, and all matters bearing upon the question of the value of the

property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchises owned by said company, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and of the gross receipts and net earning power, and the franchise and the value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its
95 findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the State board of equalization assesses and values for taxes of 1899 the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the State board of equalization that the assessed value thereof be distributed upon the said classes of property as follows:

6,075.98 miles of poles at $71.50 per mile	$434,432.57
23,767.34 miles of wire at $22.02 per mile	523,356.82
2,375 instruments at $5.70 each	13,557.50
All other property at	856,400.56
Total	$1,827,727.45."

subject to the right of objection on any sufficient ground in law, it was stipulated between counsel as follows:

1st. That the tax book should be *prima facie* evidence of the validity of the taxes thereon assessed for the year 1899, against defendant, without proof by plaintiff of any of the steps leading up to its execution and issuance; and that said tax book was properly certified.

It was also admitted: First, that defendant, since 1854, has been a corporation, organized and existing under the laws of the State of New York. Second, that as pleaded in the answer, it accepted the provisions of the act of Congress of July 24th, 1866; and that said acceptance has not been withdrawn, and that defendant transmits telegrams for the Government between its departments and officers at rates fixed by the Postmaster General. Third, that defendant is not incorporated under the laws of the State of Missouri, and has never applied for or secured from the State a license authorizing it to do business within the State under the laws thereof.

Objection was made by plaintiff to the introduction of the admission contained in paragraphs 2 and 3, but such objection was overruled and an exception taken.

A general objection was also made by plaintiff to the intro-
96 duction of any evidence by defendant for the reason that the finding and assessment of the State board of equalization was final and not subject to attack in this suit. This objection was overruled and an exception noted.

It was shown on the part of defendant, by the testimony of A. A. Lesueur, secretary of state, and as such a member of the State board of equalization, that the property, outside of St. Louis, is assessed by the local assessors at what he believed to be about thirty-five to forty per cent. of its full value, and in St. Louis at about fifty per cent. thereof, although the city assessor and city board of equalization thought it was seventy per cent. thereof.

It was also shown by the testimony of Edward C. Crow, attorney general, and as such a member of the State board of equalization, that the item of assessment: "All other property at $856,400.36," was intended to include all the taxable property of the defendant other than that specifically mentioned in the three other items, and also its "intangible property, including franchises," but as to how much the franchise value or intangible property was valued at and how much the tangible property other than that specifically enumerated included under the head of "all other property" was valued at, "I could not say."

The attorney general then further testified:

"Q. What do you understand by the meaning of the word 'franchise' as used by you in your direct examination? A. Well, the same sense in which I use it might not be agreed to by lawyers or laymen, without qualification, but I used it in the sense of representing the class of property owned by the Western Union Telegraph Company and controlled by it, such as privileges and rights to erect and maintain their poles and wires, to carry on their traffic in the different portions of the State of Missouri in connection with their rights to so erect their poles and wires and carry on their traffic wherever else their lines extended in this country and other
97 countries, representing a unity of use in the entire corporate property, making the same thereby much more valuable than it otherwise would be for use separately and independently in each Territory or country.

"Q. And therefore the privilege to be or to exist does not enter into your idea at all in the matter of values as you have explained by way of franchise? A. Oh, no, as I understand it the Western Union corporation acquires their right to exist as a corporation from an act of the Federal Congress; they have this, however, which I did not consider, and that is the right to use the posts of the Federal Government. I did not consider that as an element in fixing the franchise value of property in the use of my term of the word 'franchise,' although it might properly be considered, as the courts have held in a Massachusetts case, but I did not have that in mind when I used the word 'franchise.'"

It was further shown by the testimony of Theodore P. Cook, superintendent of the defendant, that all the property owned by the defendant on June 1st, 1898, in Missouri, outside of St. Louis, Kansas City and St. Joseph, other than that specifically enumerated would not exceed $1000, and that it had paid the taxes on the property located in the three cities and subject to local assessment there. Mr. Cook further testified that the defendant's whole system and plant in Missouri could be replaced absolutely new for $984,357.89,

and that its present system or plant was not worth over thirty-five per cent. of that amount. He further said that he had made a return to the State board of equalization showing that defendant owned property in Missouri subject to taxation on June 1st, 1898 of the value of $541,472.40.

The trial court found and decided that the term "all other property," embraced franchises derived from the Federal Government, which were non-taxable by reason of such derivation, and that the defendant is a governmental agent and instrument of interstate commerce, exercising its rights in Missouri solely by virtue
98 of such Federal authority, and so held that the tax based upon the assessment of "all other property at $856,400.56," was void, but, "that the assessment and valuation made by the State broad of equalization upon the poles, wires and instruments owned by the defendant in this State is final and conclusive, and is not subject to review or attack in this suit."

Both parties appealed.

I.

The defendant contends that it has been discriminated against, contrary to the provisions of section 4 of article 10 of the constitution of Missouri, and of the 14th amendment to the Constitution of the United States: in this, that the constitution of Missouri relied on, provides that "all property subject to taxation shall be taxed in proportion to its value," and the 14th amendment to the Constitution of the United States prohibits any State to deny any person within its jurisdiction the equal protection of the laws, and that the State board of equalization has assessed defendant's property at its full value, while the local assessors throughout the State have only assessed the property of other persons at from thirty-five to forty per cent. of its value.

In support of its contention the defendant cites, a great number of cases, among them, Cummings *v.* National Bank 101 U. S. 153; Nashville R. R. Co. *v.* Taylor, 86 Fed. 168; National Bank *v.* Kimball 103 U. S. 732; Pelton *v.* National Bank, 101 U. S. 143; Balfour *v.* City of Portland, 28 Fed. 738; Trustees of Cincinnati So. R. R. *v.* Guenther, 19 Fed. 395; Chicago, Burlington & Q. R. R. Co. *v.* Board &c. 67 Fed. 411; Railroad *v.* Board, 54 Kansas, 781; Stanley *v.* Supervisors 121 U. S. 535.

The principle here contended for is tersely expressed by Mr. Justice Miller in the case of National Bank *v.* Kimball, 103 U. S. 732, as follows: "It is held in these opinions that when the inequality of valuation is the result of a statute of the State designed to
99 discriminate injuriously against any class of persons or any species of property, a court of equity will give appropriate relief, and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation the necessary result of which is to tax one species of property higher than others and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors

and no general rule or discriminating rate adopted by a single assessor, but relies on numerous instances of partial and unequal valuations which establish no rule on the subject."

The defendant has not brought itself within the rule announced in those cases, for it has shown no combination among assessors and no course of conduct among them to discriminate against the defendant or other telegraph companies and other property owned by citizens generally. It has only shown by the testimony of one member of the State board of equalization that in his judgment the valuation put upon property generally is only thirty-five or forty per cent. of its true value. The law contemplates that for purposes of taxation property shall be assessed at its true value in money (R. S. 1899 § 9180), and it also presumes that all officers do their duty. Agan *v.* Shannon, 103 Mo. 661; State *ex rel. v.* Bank, 120 Mo. 161; Mathais *v.* O'Neill 94 Mo. 520. The evidence adduced is not sufficient to overthrow this presumption, nor to establish a combination or unlawful course of conduct. It is only enough to show what the witness believed to be the value of the property, but not enough to convict the local assessors of intentional or systematic violation of duty.

But aside from this the cases relied on also establish another rule, which is voiced by Mr. Justice Field, in Stanley *v.* Supervisors, 121 U. S. 535, that when the statutes of the State provide a board for the correction of error and irregularities of assessors in the
100 assessment of property for the purpose of taxation, the official action of that body is judicial in character and its judgments are not open to attack collaterally, but, "when the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations *a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due.*" To the same effect are Cummings *v.* Bank, 101 U. S. 153; Balfour *v.* City of Portland, 28 Fed. 738; Pelton *v.* Bank, 101 U. S. 143; Trustees &c. Railroad *v.* Guenther, 19 Fed. 395; Railroad *v.* Board, 67 Fed. 411.

The defendant cannot avail itself of these cases, for the reasons, 1st, that it seeks to raise the question of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization; 2d that such questions can only be raised by a direct attack, in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collection of the excess restrained. This the defendant has not done in this case. It simply alleges a discrimination or excessive tax, and then seeks to defeat the whole assessment without paying or tendering anything, notwithstanding it admits by its answer and its proofs that it has property in this State subject to taxation of the value of $541,472.40. Upon the authority of the cases relied on by it, this cannot be done. It results that defendant's appeal is without merit, and the judg-

ment of the circuit court upon this branch of the case is right and must be affirmed as to defendant's appeal.

II.

The trial court held that the item "all other property at $856,400.56," included franchises which were derived from the Federal Government, and were non-taxable by reason of such derivation, and that the defendant is a governmental agent and an
101 instrument of interstate commerce exercising its rights in Missouri solely by virtue of such Federal authority, and hence held that the portion of the tax sought to be recovered which was based upon this item could not be legally charged on defendant. From this the plaintiff appealed.

The defendant is a corporation organized under the laws of the State of New York. It has never received any authority or right or permission from the State of Missouri to do business in this State or to erect its poles or string its wires on, over or upon the public highways and places in this State. Ever since 1865 (R. S. 1865 ch. 65 p. 349, sec. 5) there has been a statute in this State authorizing any telegraph company *organized under the laws of this State*, to place its poles and wires along, over and upon the public highways. But there is not now, and never has been any law of this State granting any such franchise or permission to any foreign telegraph company. The defendant's sole right to do business in Missouri arises out of the act of Congress approved July 14th, 1866 (U. S. Stats. at Large 1865–'67 pp. 221–'22).

Briefly stated that act gives the defendant the right to maintain its system of telegraph along the military and post roads of the United States, and over, under, and across all navigable streams of the United States, and requires the defendant to transmit and give priority to messages of the Government between its various departments, officers and agents, at rates to be annually fixed by the Postmaster General, and further requires the defendant to sell its entire system to the Government at any time upon a valuation to be fixed by appraisers. The defendant accepted the provisions of this act and has ever since been operating under it.

But while this act has been held to be a legitimate regulation of commerce between the States and to constitute the defendant, *as to Government business a Government agency*, and an instrument of interstate commerce, (Pensacola Tel. Co. *vs.* Western Union Tel. Co.
102 96 U. S. 1; Telegraph Co. *vs.* Texas, 105 U. S. 460); nevertheless it is equally as well established that; "The property of a telegraph company within a State is subject to State taxation like all other property. The fact that the company is engaged in interstate commerce, or that it is an agent of the Government, can afford no immunity from the taxation of its property." 25 Am. & Eng. Enc. Law (1st ed.) p. 873 and cases cited. Western Union Tel. Co. *vs.* Texas, 105 U. S. 464; Western Union Tel. Co. *vs.* Taggart, 163 U. S. 1; Western Union Tel. Co. *vs.* Mass., 125 U. S. 530, and 141 U. S. 40.

The plaintiff relies, principally, upon the cases of Western Union

Telegraph Co. *vs.* Massachusetts, 125 U. S. 530, and the Same *vs.* Same 141 U. S. 40. The syllabi in those cases express clearly the points decided. In the first case (125 U. S. 530) the syllabus is as follows:

"The privilege conferred upon telegraph companies by Rev. Stat. § 5263 carries with it no exemption from the ordinary burdens of taxation in a State within which they may own or operate lines of telegraph.

The laws of Massachusetts impose a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines; and such a tax is essentially an excise tax, and is not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by Rev. Stat. § 5263, nor by the commerce clause of the Constitution.

The principles established by the statutes of Massachusetts for regulating the taxation of corporations doing business within its limits, whether domestic or foreign, do not appear to be unfair or unjust.

A State statute which authorizes an injunction to be issued to restrain a corporation organized under the laws of another
103 State, whose taxes are in arrear from prosecuting its business within the State until the taxes are paid, is void so far as it assumes to confer power upon a court to so restrain a telegraph company which has accepted the provisions of Rev. Stat. § 5263 from operating its lines over military and post roads of the United States."

In the second case (141 U. S. 40) the syllabus is as follows:

"The tax imposed by the statutes of Massachusetts, (Pub. Stat. c. 13, §§ 40, 42) requiring every telegraph company owning a line of telegraph within the State to pay the State treasurer 'a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock,' deducting such portion of that valuation as is proporti-nal to the length of its lines without the State, and deducting also an amount equal to the value of its real estate and machinery subject to local taxation within the State, is in effect a tax upon the corporation on account of property owned and used by it within the State; and is constitutional and valid, as applied to a telegraph company incorporated by another State, and which has accepted the rights conferred by Congress by § 5263 of the Revised Statutes."

It will thus be observed that in the first case it was held proper to tax the tangible property of the company in that State, and that "the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines." And in the second case it was held proper to require the company to pay "a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock," "deducting such portion of that valuation as is proporti-nal to the length of its lines without the State, and deducting also an amount equal to the value

of its real estate and machinery subject to local taxation within the State." This method of taxation was expressly authorized by the statute of that State.

It was argued in the last case cited that such a tax was a
104 tax upon its right or franchise derived from the act of Congress and hence was a tax on its franchise and not on its property. But the Supreme Court of the United States held that such a method of taxation was not a tax on its franchise, but was only a method to ascertain the value of the tangible property located in the State of Massachusetts.

Mr. Justice Gray, delivering the opinion of the court said:

"But this court, in answering that argument and upholding the validity of the tax, affirmed the following propositions:

The franchise of the company to be a corporation, and to carry on the business of telegraphing, was derived not from the act of Congress, but from the laws of the State of New York, under which it was organized; and it never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State, and to erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to the support of the government of that State.. 125 U. S. 547, 548.

By whatever name the tax may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation; and those laws attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. 125 U. S. 547.

The tax, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for
105 ascertaining the value of that property. Such a tax is not forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution, 125 U. S. 552.

The statute of Massachusetts is intended to govern the taxation of all corporations doing business within its territory, whether organized under its own laws or under those of some other State; and the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not an unfair or unjust one; and the details of the method by which this was determined have not exceeded the fair range of legislative discretion. 125 U. S. 553.

That decision was cited by the court in Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411, 426, 427, and in Leloup *v.* Mobile, 127 U. S. 640, 649."

The rules established by the adjudications may be stated to be: 1st, that the Western Union Telegraph Co. is as between governmental departments, a governmental agency, but it is not so as between the company and a State or a citizen; 2d, that the telegraph company is an instrument of interstate commerce, and has a right to enter a State and transact business; 3d, that the telegraph company being an instrument of interstate commerce, and deriving its powers in this regard from the United States, no State has a right to prevent such company from doing business in the State, for that would be an interference with interstate commerce, 4th, that the tangible property of the telegraph company located in a State is subject to taxation like any other property in that State, and its franchise or right derived from the act of 1866 does not exempt such property from taxation by the State in which such property is located; 5th, that in determining the value of the tangible property of the company located in any State, it is proper to compare the length of its lines in that State with the length of its entire lines, or

106 to take the aggregate value of the shares of its capital stock, and deduct therefrom such portion of that valuation as is proportional to the length of its lines without the State, and also to deduct therefrom the value of its real estate and machinery subject to local taxation within the State. And that such taxes, so assessed, constitute an excise tax upon the property or capital of the corporation and not a tax upon any franchise of the corporation.

In the case at bar the board of equalization first ascertained the number of miles of poles and wires and the number of instruments owned by the defendant, and used in this State, and placed a valuation upon them. The board then considered "all other property" owned by the defendant located in this State and put a valuation upon that. The defendant's evidence shows that it did own other property in this State besides the poles, wire and instruments specially enumerated and valued. But it contends that such other property was worth only one thousand dollars and not $856,400.56, a the board found it to be worth. The utmost that could therefore be said of this item is that the defendant and the board differed in opinion as to the value of such other property, and this being an action at law wherein the defendant attempts to defeat the whole levy, as long as it appears that the defendant owned *some* property and the only question is whether it was of the one value or the other, the defense must fail, for a court of law has no machinery for determining how much such property was really worth, and in addition if all defendant claims be true it is merely a case of overvaluation and not an erroneous assessment, and under the law of this State mere overvaluation is no defense to a suit upon a tax bill, for section 7579 R. S. 1889 (sec. 9197 R. S. 1899) expressly provides that: "Valuations placed on property by the assessor or board of equalization shall not be deemed to be erroneous assessments under this section."

107 But aside from this such a defense is not available to the defendant in a suit upon the tax bill in a court of law, but "a party aggrieved may resort to a court of equity to restrain the

exaction of the excess, upon payment or tender of what is admitted to be due." Stanley *v.* Supervisors, 121 U. S. 535. This the defendant has wholly failed to do. It admits it owns some property that is subject to taxation other than that specifically enumerated, and it has not sought the aid of a court of equity to relieve it against the claimed excessive tax, nor has it paid or offered to pay the tax upon the other property it admits it owes, even upon its own basis of valuation thereof. So that even if this was an appropriate proceeding in equity, the defendant has not brought itself within the rule entitling it to relief as laid down by the Supreme Court of the United Sates.

The defendant, however, contends, and the trial court found, that "all other property at $856,400.56," included franchises which were derived from the Federal Government and were non-taxable by reason of such derivation, and that the defendant is a governmental agent and an instrument of interstate commerce, exercising its rights in Missouri solely by virtue of such Federal authority, and hence that court held that the portion of the tax based upon this item of assessment could not be recovered.

The trial court was right in holding that the defendant is a governmental agent, but this only extended to its relations between the Government and its agent. The trial court was also right in holding that the defendant is an instrument of interstate commerce. But the trial court was in error in holding that the defendant derived its franchise—that is, its right to exist and be a corporation and do a telegraph business—from the Government of the United States. That franchise is derived from the State of New York, and not from the Government of the United States. Neither the act of Congress of 1864, nor its acceptance by the defendant, created
108 the defendant or gave it the right to do business. The defendant was created by the laws of New York twelve years before the Federal statute was enacted. The defendant was obliged to be a telegraph company or engaged in that business before it could accept the provisions of that act. It could not be created a telegraph corporation by the Government of the United States or at any rate it had not been so created. The fact that it is an instrument of interstate commerce or that it had accepted the act of 1864, did not exempt its property in this State from taxation, 25 Am. & Eng. Ency. Law (1st ed.) p. 873; Western Union Tel. Co. *vs.* Texas 105 U. S. 464; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1; Western Union Tel. Co. *v.* Mass., 125 U. S. 530; *Ibid v. Ibid*, 141 U. S. 40.

So that, when, in determining the value of the property of the defendant in this State, the board of equalization took into consideration "the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof," it did not and could not have included therein any franchise derived by the defendant from the Government of the United States, because that Government had conferred

no such franchise; nor was such a valuation placed upon "all other property," a tax upon the franchise of the defendant company. The franchise derived by the defendant from the State of New York was considered by the board in determining the value of the property of the defendant located in this State. That is, that property was valued not as so many poles, so much wire, so many instruments or so much "other property," in the abstract, but was valued in the concrete, in the relation that such property in the abstract bore to other property in the abstract, which being brought into relation towards each other—into a *system*, located partly in this State and partly in other States, gave each part a concrete value, which was
109 much greater than its abstract value. The right to exist—the franchise—of the defendant was property, and was subject to taxation, either directly, in the proportion that the portion of the franchise exercised in this State bore to the proportion of the franchise exercised in all other States, or indirectly, as was done in Massachusetts and as was done here, by being impressed upon the tangible property owned by it, thereby increasing its value, and by considering the franchise and its tangible property as a system, and then assessing the part of the property forming a part of the system and located in Missouri as of its proportionate value of the whole property constituting the system. This was expressly held to be proper in Western Union Tel. Co. *v.* Mass. 125 U. S. 530. The rule approved in Western Union Tel. Co. *v.* Mass. 141 U. S. 40, accomplishes the same result, for it is "a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares of its capital stock," deducting such proportion of that valuation as is proportional to the length of its lines without the State, and deducting also an amount equal to the value of its real estate and machinery subject to local taxation within the State. This is only another method of adding the value of the franchise to the value of the property located in the State, and thereby taxing its concrete value, which is its real value, and the value at which it could be sold.

It will not do to say, as the defendant does, that the poles, wire and instruments could be replaced new at a cost of $984,357.89, and that all its other property in this State is only worth $1,000. Those sums may represent the value of the property in the abstract, but they do not represent the value of the property in the concrete, because as a part of a system a greater value is necessarily impressed upon the abstract property, and thereby the property becomes, it may be, worth many times as much as it would be if considered in the abstract. No injustice is done to the defendant in so valuing it, because the defendant so uses it, and treats it, and because it
110 is worth more, for it would sell for more as a necessary part of a system than it would if it was sold in the abstract or than if it had no such relation to the other parts of the system. In other words the defendant values it for taxation at its abstract value, while it enjoys it and derives profit from it according to its concrete value. It follows that the judgment of the circuit court holding that the tax assessed against "all other property at $856,400.56" to be unlawful, is erroneous, and that the plaintiff is entitled to a judg-

ment for the whole amount of the tax sued for. Judgment is accordingly entered for the plaintiff here for $1027.22, back taxes for the year 1899, with interest thereon from the first of January 1900 at the rate of one per cent. per month (R. S. 1899 sec. 9225) and costs. All concur.

W. C. MARSHALL, *J.*

And afterwards to wit, on the 29th day of January, 1902, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* CHRIS GOTTLEIB, Collector, etc., Pl'ff, App.,
vs.
WESTERN UNION TELEGRAPH Co., Def't, App.

Now at this day, there is presented to the Honorable Gavon D. Burgess, chief justice of the supreme court of the State of Missouri, in chambers, a petition for a writ of error to the Supreme Court of the United States, a citation directed to the said plaintiff appellant, citing and admonishing him to appear at a Supreme Court of the United States on the 28th day of February, 1902, and a bond in the sum of three thousand dollars; which said writ of error is allowed, said citation signed, said petition and assignment of errors filed and said bond approved, ordered filed and made a part of the record herein.

111 Which said petition for writ of error is in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1902.

STATE OF MISSOURI *ex Rel.* CHRIS GOTTLIEB, Collector, Appellant,
vs.
WESTERN UNION TELEGRAPH COMPANY, Appellant.

Now comes the Western Union Telegraph Company, appellant, and respectfully says that it feels aggrieved by the proceeding and judgment of this honorable court in the above-entitled cause, and that it believes this honorable court has committed the following errors in said cause, to wit:

1. The court erred in said cause in deciding that appellant was not discriminated against by the State board of equalization of Missouri in assessing for purposes of taxation the property of said Western Union Telegraph Company at more than its full and actual value, whereas said board intentionally and systematically equalized and adjusted the values of real and personal property, generally for purposes of taxation, at 40 % of the actual values of such property, all of which appellant set up and claimed was in violation of the fourteenth amendment to the Constitution of the United States.

2. The court erred in refusing to hold that the franchises, exercised by appellant in the State of Missouri, were derived wholly

act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other
112 purposes" and that said State board of equalization taxed said franchises in violation of the provisions of the Constitution of the United States.

3. The court erred in refusing to hold that the item involved in the assessment complained of in said cause, under the head of "all other property" and amounting to the sum of $856,400.56 was, in fact, an assessment of the franchises of appellant, derived from the Federal Government in pursuance of the act of Congress mentioned in the error last assigned and, therefore, violative of the laws of the United States and of the provisions of the Constitution of the United States.

4. The court erred in failing to find that the only franchises exercised by appellant in the State of Missouri were those derived from the act of Congress mentioned and that the same were not subject to taxation by the State board of Missouri through said board of equalization, or otherwise.

5. The court, having found and held that plaintiff in error was a governmental agent and an instrument of interstate commerce, erred in holding that the item "all other property," hereinbefore mentioned, did not embrace franchises of appellant derived from the Government of the United States and that the same had been taxed in said item in violation of the laws of the United States of section 8, article 1 and other provisions of the Constitution of the United States.

6. The court erred in rendering judgment in favor of appellant for the amount sued for.

7. The court erred in refusing to entertain the defenses made by appellant in said cause for the alleged reason that no tender, of any part of the taxes involved, had been made by appellant to appellant.

8. The court erred in reversing the finding and judgment of the circuit court of Jackson county, Missouri.

Wherefore, the premises considered, this appellant prays
113 that it may be awarded a writ of error by this honorable court, issuing out of the Supreme Court of the United States, addressed to this honorable court for the purpose of enabling said Supreme Court of the United States to examine and correct the errors assigned and for such other and further proceedings as to said Supreme Court of the United States may seem proper.

KARNES, NEW, HALL & KRAUTHOFF,
DICKSON & SMITH,
Attorneys for Western Union Telegraph Company.

And which said assignment of errors in in words and figures as follows, viz:

In the Supreme Court of the United States, October Term, 1902.

STATE OF MISSOURI *ex Rel.* CHRIS GOTTLIEB, Collector, Defendant in Error,
vs.
WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error.
} Assignment of Errors.

Now comes The Western Union Telegraph Company, plaintiff in error, by its counsel and respectfully represents that it feels ag-rieved by the proceedings and judgment of the supreme court of the State of Missouri in the above-entitled cause and assigns error thereto, as follows:

1. The court erred in said cause in deciding that plaintiff in error was not discriminated against by the State board of equalization of Missouri in assessing for purposes of taxation the property of said Western Union Telegraph Company at more than its full and
114 actual value, whereas said board intentionally and systematically equalized and adjusted the values of real and personal property, generally for purposes of taxation, at 40 % of the actual values of such property, all of which plaintiff in error set up and claimed was in violation of the fourteenth amendment to the Constitution of the United States.

2. The court erred in refusing to hold that the franchises, exercised by plaintiff in error in the State of Missouri, were derived wholly from the act of Congress, approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes" and that said State board of equalization taxed said franchises in violation of the provisions of the Constitution of the United States.

3. The court erred in refusing to hold that the item involved in the assessment complained of in said cause, under the head of "all other property" and amounting to the sum of $856,400.56 was, in fact, an assessment of the franchises of plaintiff in error, derived from the Federal Government in pursuance of the act of Congress mentioned in the error last assigned and, therefore violative of the laws of the United States and of the provisions of the Constitution of the United States.

4. The court erred in failing to find that the only franchises exercised by plaintiff in error in the State of Missouri were those derived from the act of Congress mentioned and that the same were not subject to taxation by the State board of Missouri through said board of equalization, or otherwise.

5. The court, having found and held that plaintiff in error was a governmental agent and an instrument of interstate commerce, erred in holding that the item "all other property," hereinbefore mentioned, did not embrace franchises of plaintiff in error derived from the Government of the United States and that the same had been taxed in said item in violation of the laws of the United
115 States of section 8, article 1 and other provisions of the Constitution of the United States.

6. The court erred in rendering judgment in favor of defendant in error for the amount sued for.

7. The court erred in refusing to entertain the defenses made by plaintiff in error in said cause for the alleged reason that no tender, of any part of the taxes involved, had been made by plaintiff in error to defendant in error.

8. The court erred in reversing the finding and judgment of the circuit court of Jackson county, Missouri.

Wherefore, plaintiff in error prays this honorable court to examine and correct the errors assigned and for a reversal of the judgment of the supreme court of the State of Missouri, entered in the above-entitled cause with directions to said supreme court of Missouri to remand said cause with directions to said circuit court of Jackson county to retry said cause and award judgment against plaintiff in error for not to exceed 40% of the amount fixed by said State board of equalization as the value of the property of plaintiff in error in Missouri on June 1st, 1898, consisting of the poles, wires and instruments to it belonging.

KARNES, NEW, HALL & KRAUTHOFF,
ELENEIOUS SMITH,
DICKSON & SMITH,
Attorneys for Plaintiff in Error.

And which said bond is in words and figures as follows, viz:

Know all men by these presents, that we, The Western Union Telegraph Company and Russell Sage are held and firmly bound unto the State of Missouri at the relation of the collector of the revenue for Jackson county, Missouri, in the full and just sum
116 of three thousand dollars ($3000.00) to be paid to the said collector of the revenue, or his successor in office, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of January, in the year of our Lord one thousand nine hundred and two.

Whereas, lately, at the October term, 1901, of the supreme court of the State of Missouri, in a suit pending in said court between The State of Missouri at the relation of Chris Gottlieb as collector of the revenue for Jackson count, Missouri, plaintiff and The Western Union Telegraph Company, defendant, judgment was rendered against the said Western Union Telegraph Company and the said Western Union Telegraph Company *has* obtained a writ of error out of the Supreme Court of the United States to said court to reverse the judgment in the aforesaid suit and a citation directed to said State of Missouri, at the relation of said Chris Gottlieb as collector of the revenue for the county of Jackson, State of Missouri, and admonishing said State of Missouri at the relation of said Chris Gottlieb, collector of the revenue for the county of Jackson to be and appear in the Supreme Court of the United States at the city of Washington, thirty (30) days from and after the date of said citation.

Now the condition of the above obligation is such that if the said Western Union Telegraph Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

117 THE WESTERN UNION TELEGRAPH CO.,

[SEAL.] By THOS. F. CLARK, *Vice-President.*

RUSSELL SAGE. [SEAL.[

Attest: A. R. BREWER, *Secretary.*

Sealed and delivered in presence of—

E. A. MACCLEAN,

[SEAL.] *Notary Public, N. Y. Co., No.* 1.

Approved by—

G. D. BURGESS,

Judge and Chief Justice of the Supreme Court of the State of Missouri.

STATE OF MISSOURI, *sct:*

I, John R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the record and proceedings had and made in said court in the cause of The State of Missouri at the relation of Chris Gottleib against The Western Union Telegraph Company as fully as the same remain on file and of record in my office.

In testimony whereof, I hereunto set my hand and *and* affix the seal of said court at the city of Jefferson, this 5th day of February, 1902.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

Endorsed on cover: File No. 18,423. Missouri supreme court. Term No. 256. The Western Union Telegraph Company, plaintiff in error, *vs.* The State of Missouri at the relation and to the use of Chris. Gottlieb, collector of the revenue for Jackson county, Missouri. Filed February 26th, 1902.

FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
APR 13 1903
JAMES H. McKENNEY,
Clerk.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
STATE OF MISSOURI, at the relation and to the use of CHRIS. GOTTLIEB, Collector of the Revenue for Jackson County, Missouri,
Defendant in Error.

No. 256.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

ELENEIOUS SMITH,
ALEXANDER NEW,
For Plaintiff in Error.

JOHN F. DILLON,
HENRY D. ESTABROOK,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.

INDEX.

PAGE

Statement of Case:

Pleadings 2-4
Stipulations 4, 5
Alexander A. Lesueur's evidence 5-9
Edward C. Crow's evidence 9-11
Theodore P. Cook's evidence 11, 12
Order of State Board of Equalization 13
Findings of trial Court 15
Extract from Opinion of trial Court 16
Extract from Opinion of Supreme Court of Missouri, showing mode of assessment 16, 17
Assignment of errors 19, 20
Points and authorities 21-25

Index to Argument:

I.

The first contention of the plaintiff in error is that the item in the assessment made by the State Board of Equalization for the taxes of 1899, reading "all other property" at $856,400.56, means franchises, and franchises alone 26
Analysis of and comments on the Opinion of the Supreme Court of Missouri in this case 42
Unjust and illegal discrimination against the defendant 46

II.

PAGE

The defendant was entitled to defend against the wrongful assessment in the present action at law to enforce the tax. A bill in equity by the defendant is not necessary in an action like the present..... 50

III.

The valuation of defendant's poles, wires and instruments at first cost, whereas the testimony proves that through years of actual use such property had depreciated sixty per cent., was in itself gross discrimination; but the valuation of the property of all other persons, companies and corporations at forty per cent. of the actual value of such property in pursuance of a uniform and systematic practice of many years' standing, was discrimination upon discrimination, and amounted to a legal fraud upon this defendant, which entitles it to make the defense and have the relief sought in the present case..... 57

The defendant in the case at bar contends that the enforcement of the judgment of the Supreme Court of Missouri in this case would amount to the taking of private property without due process of law, and also to a denial of the equal protection of the law, a violation of the Fourteenth Amendment of the Constitution of the United States..... 64

PAGE

The doctrine of this Court and of other Federal Courts and the effect of the Fourteenth Amendment as to discriminating assessments. Under this doctrine the Telegraph Company's defense ought to have been sustained 67

IV.

With but few exceptions, the Supreme Courts of all the States in which the question has arisen have upheld the constitutional guarantee of equality and uniformity rather than make a few individuals or corporations bear the burden of what Mr. Chief-Justice Beasley termed the assessor's malfeasance 89

Case Summarized 91

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, vs. STATE OF MISSOURI, at the relation and to the use of CHRIS. GOTTLIEB, Collector of the Revenue for Jackson County, Missouri, Defendant in Error.	No. 256.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Statement, assignment of errors, points and authorities, and argument for plaintiff in error, the Western Union Telegraph Company.

STATEMENT OF CASE.

THIS IS AN ACTION AT LAW originally brought by the Collector of the Revenue for Jackson County, Missouri, in the Circuit Court of Jackson County, Missouri,

against the Western Union Telegraph Company, to recover the sum of $1,027.22, the amount of taxes assessed by the State Board of Equalization for the year 1889 against the Western Union Telegraph Company apportioned to Jackson County, Missouri.

Rec., pp. 6–7.

THE ANSWER of defendant was,

FIRST, a general issue as to the legality of the tax assessed and levied against the property of defendant.

Rec., p. 7.

SECONDLY, as a separate defense, the company pleaded that it presented to the State Board of Equalization a sworn return showing the true value of its property in Missouri on the 1st of June, 1898, and particularly in Jackson County, Missouri, and further pleaded that outside of its general plant, consisting of poles, wires, instruments and batteries, it had in Jackson County other property, such as furniture, fixtures, etc., of the value of $1,000, *the taxes upon which latter sum had been assessed and paid.* That, as required by law, said board proceeded to determine the value of defendant's property in Missouri, and defendant, through its agents, offered before the said board to prove that the fair aggregate value of all of its property in Missouri on June 1st, 1898, was the sum of $541,472.40. That the board, ignoring the sworn return, did thereafter value said property under the classification of poles, wires and instruments and "all other property" at an aggregate of $1,827,727.45; the item "all other property" being the sum of $856,400.56. That the aggregate of the sums assessed

on account of poles, wires and instruments was sufficient to have produced a complete and entirely *new system* in the State of Missouri on the 1st of June, 1898. That said board, with a full knowledge of the true value of said poles, wires and instruments, did, with the intent to injure defendant by compelling it to pay an excessive and disproportionate share of State and local taxes, fix said valuation at more than the true and actual value of said property. That under the law it was the duty of the board to adjust and equalize the valuation of all real and personal property in Missouri among the several counties in the State, and that by a common arrangement, understanding and purpose among the members of the board, and in violation of the constitution and laws of the State of Missouri, and with intent to compel defendant to pay a greater proportion of taxes than those paid by the general owners of real and personal property in Missouri, said board did assess the real and personal property generally at from 35 to 40 per cent. of its true value, and the property of the defendant telegraph company at more than its full value.

That on June 1st, 1898, the telegraph company had no property in Missouri other than poles, wires and instruments, excepting certain furniture, fixtures and property of like character of a valuation not to exceed $5,000, $4,600 worth of which was located in the cities of St. Louis, Kansas City and St. Joseph, *and all locally assessed, and the taxes so assessed paid.* That in assessing "all other property" the board did intend to, and in fact did, assess the *franchises* of the defendant. That for the purpose of concealing the truth with respect to its assessment of defendant's franchises it designated the same as "all other property." That

the board was without power to assess such franchises, which were derived solely from the United States and the State of New York, and exercised, so far as the State of Missouri was concerned, by virtue solely of Federal grant. And that such an assessment was in violation of the Constitution and laws of the United States.

THIRDLY. Another defense set up was that defendant is engaged in maintaining lines of telegraph throughout the United States, and over and along the post-roads of the same, and across the navigable streams and waters of the United States, and that by virtue of its acceptance of the provisions of the Act of Congress of July 24th, 1866, it became a governmental agent and instrument of foreign and inter-state commerce exercising its rights as such in Missouri only in pursuance of the authority granted by Act of Congress. That the assessment made by the board of said item, "all other property," $856,400.56 was, in fact, an assessment solely on account of franchises granted defendant by the Constitution and laws of the United States, and that the board was without authority to assess or tax such franchises.

Rec., pp. 7, 8, 9, 10, 11, 12.

Subject to such objections as might be made in law, THE FOLLOWING STIPULATIONS were filed in the cause:

FIRST. That the tax book should be *prima facie* evidence of the validity of the taxes thereon assessed for the year 1899 against defendant, without proof by plaintiff of any of the steps leading up to its execu-

tion and issuance, but express reservation of the right on the part of the defendant to introduce any competent and relevant evidence to sustain the issues on its behalf.

Rec., p. 15.

It was also admitted, *first*, that the defendant since 1854 has been a corporation organized and existing under the laws of the State of New York. *Second*, that, as pleaded in the answer, it accepted the provisions of the Act of Congress of July 24th, 1866, and that said acceptance has not been withdrawn, and that defendant transmits telegrams for the Government between its departments and officers at rates fixed by the Postmaster General. *Third*, that defendant is not incorporated under the laws of the State of Missouri, and has never applied for or secured from the State a license authorizing it to do business within the State under the laws thereof.

Rec., p. 16.

A general objection was made by plaintiff in the lower Court to the introduction of any evidence by defendant for the reason that the finding and assessment of the State Board of Equalization was final and not subject to attack in this suit. Said objection was overruled, and exception noted.

Rec., pp. 16, 17.

The Evidence.

Alexander A. Lesueur, on behalf of the plaintiff in error, testified that he was Secretary of State of the State of Missouri and had held that office for eleven years. The witness was questioned with respect to

what was considered by the State Board in fixing the valuations hereinbefore referred to and as embodied in the resolution of the Board, which will be found on pages 30 and 31 of the record and testified as follows:

"Q. Well, it is true, is it not, as recited in the record of the Board, that in fixing this valuation the traffic and business of the company, the market and par value of its stocks and bonds and gross receipts and net earnings and franchises were considered? A. Those things that were mentioned in the record of the board as being considered were considered.

"Q. And I am right in saying, am I, in connection with that record, that the figures that you reached here were the result of that consideration? A. Unquestionably.

"Q. Then I again ask, am I not right in picking out the one element of franchises and saying that that was considered, no matter what sort of franchise it was, that was considered and entered into the assessment? A. That is stated in the record.

"Q. And it is a fact? A. It is a fact that it was considered as one of the elements" (Rec., p. 21).

* * * * * *

"Q. Well, then Captain, not being able to give either in figures or what proportion the amount at which franchises of this company were assessed, you do, however, know, as the record recites, that they were assessed at something and entered into this final figure that I have mentioned? A. That was stated in the record.

"Q. And that is a fact, is it not? A. I assume that it is.

"Q. I mean you, yourself, voted on some assessment of franchises, did you not? I ask for your individual action? A. I considered all those things that are stated in the record.

"Q. Yes, sir; and then you did consider franchises? A. That is one of the things stated in the record" (Rec., pp. 21, 22).

"Q. Captain, what do you mean and what is your understanding of the term 'franchises' as used in taxation by the State Board of Equalization? A. I do not undertake to say what definition is placed on franchise valuation by the State Board of Equalization. My own understanding of the term is that in regard to

quasi public corporations enjoying certain privileges granted by law *there is a value in addition to that of the tangible property.* The most feasible manner of arriving at an estimate of *this* valuation seems to be to ascertain the market value of the capitalization of the corporation, as a general rule, the market value of its shares of stocks and bonds, *and from this to deduct the valuation of the tangible property, real and personal, which is otherwise assessed.*"

"Q. And the difference between the valuation of the tangible property and the valuation of the entire property as above indicated is to be considered the franchise valuation? A. Yes, sir" (Rec., pp. 23, 24).

Interrogated with respect to the general rule which has prevailed in Missouri as to the assessment of real and personal property generally, he testified as follows:

"Q. Captain, I will ask you if you are familiar with the rule that has prevailed, if there has been one in our State, for many years, and particularly the eleven years that you have held the office of Secretary of State, with regard to the assessment of real and personal property throughout the State? A. I think so.

"Q. I mean its general assessment. A. I think so.

"Q. Captain, I will ask you if you are familiar with the rule existing in the State of Missouri with respect to the average proportion of actual value of real and personal property adopted by the assessing office as assessable value of such property for taxation purposes? A. I am familiar with the practice.

"Q. Well, that is what I want, practice or general custom. A. The first question that you asked me was as to a rule, and I can hardly answer that affirmatively for the reason that there are several. *The practice has grown up in Missouri for many years on the part of the assessors to return for assessment a portion only of the values of real and personal property.* The practice of the State Boards of Equalization has been to equalize these various valuations as between counties. It might appear on the face of this proceeding that the State Board was not literally complying with the law which requires assessments to be at real cash value. The

boards have endeavored to remedy this defect, which they considered an evil and in the way of true equalization, but without success. One important reason for failure being its inability at the proper time to secure from the General Assembly such reduction of levy which, accompanied with a doubling of the assessment, would have procured only sufficient revenue for the economical administration of the State government. It followed in a general way that properties which were subsequently assessed by the State Board of Equalization, *composing an original assessing board*, were in the main placed upon the same basis of valuation as had previously been the personal and real property of the State.

"Q. Now, Captain, will you kindly state, if you can, what would be a fair average figure that would represent the proportion of actual value adopted throughout the State well, say, during the past five years, for assessment of real and personal property? A. Well, I would reply to that, that taking personal property and real property altogether, outside of the city of St. Louis, the average valuation was about 40 per cent. (Rec., p. 22).

"Q. In other words, that outside of the city of St. Louis the taxes during the past five years, for illustration, would be assessed on a valuation that would be about 40 per cent. of the actual value of real and personal property? A. The State Board of Equalization has heard a great deal of evidence on this point, and that is my conclusion drawn from that evidence.

"Q. And what would the proportion be, Captain, stating as nearly as you can from your official knowledge, with respect to the city of St. Louis, which you excluded in your preceding answer? A. I would answer that question also in an explanatory way. Necessarily they state that they assess the property at a little higher valuation than collateral testimony shows it is assessed. I don't think that is a matter of bad faith or intentional misrepresentation, but simply grows out of the natural desire to approximate to the law as closely as possible. In the city of St. Louis the Assessor and Board of Assessors make the statement that their valuation is about seventy per cent. of the actual cash value of property. From other testimony and investigations made by the State Board of Equalization in years past and personal inquiry, my own opinion is that property in the city of St. Louis is

assessed at more nearly fifty per cent. of its actual cash value than the sum above stated.

"Q. Then, Captain, from your knowledge as an officer of the State Board of Equalization and your personal information, am I right in saying that it is your best judgment that during the past five or perhaps more years property throughout the State in the various counties and cities, other than the city of St. Louis, real and personal, has been assessed at about forty per cent of its actual cash value and in the city of St. Louis at about fifty per cent. of its actual cash value? A. That is my opinion" (Rec., p. 23).

EDWARD C. CROW, witness on behalf of the plaintiff in error, testified as follows:

"Q. Then, General, assuming, as I believe is the fact, that you did vote in favor of the entry that is here, the resolution or whatever it may be styled, your recollection is that the record properly sets forth the action on your part, as well as that of the others members? A. Why, I don't know whether we voted to assesss it at that figure or not. That purports to be a copy. I guess that copy is correct. We voted to increase that assessment; we did increase it very materially. We increased it over prior years; we did do that. But I will say this with reference to that record, that the record there of course only discloses the results of the findings of the board, and it does not purport to set forth all the details, the facts and the evidence which we have before us, which facts and evidence of course you will find reported very fully in the official records of the board, and as far as the others members of the board are concerned, I can't say what they considered in voting, which they did vote for the resolution, and in basing that value. I can only speak for myself, and in speaking for myself I did consider all those things in arriving at that value (Rec., p. 27).

"Q. There is an item which is not specific; of course we understand what poles and wires and instruments are, but there is one item in the assessment which the board made for that year under the heading 'All other property at $856,400.56,' and I will ask you, of course, as a matter of your own recollection, if you can tell us what from your standpoint was embraced in that item?

A. In reply to your question I would say that I could not now name what all was included in that item of ' all other property,' but *it occurs to me that there was other tangible property included in the item ' all other property,'* besides the enumerated items preceding this one in the schedule ; *for instance, desks and office furniture repairs and the various classes of property that I presume the company then had and now has, subject to taxation in this State.* I suppose also there was included in that *what is known as the intangible value of property, to-wit, the franchise value,* but as to how much the franchise value or intangible property was valued at and how much the tangible property other than that specifically enumerated included under the head of ' all other property ' was valued at, I could not say.

" Q. General, are you able in your mind, even in the roughest way, to fix the proportion of the one to the other; I mean on any basis at all that you think would be about right? A. Not at this time. I would have to make the figures and look at the full record before me as it was then, and I don't know that even from that I could arrive at anything like an accurate conclusion.

" Q. Let me ask it in this way. Are you able from your memory to say whether or not the intangible property, such as franchise, constitutes a considerable part of this $856,400.56 without binding you to the proportion or figures? A. Without undertaking to be specific as to figures or as to proportional quantities, *I would say that in my opinion the intangible value of the property of the Western Union Company in this State constituted a considerable element in the item last enumerated in the schedule of property under the designation of ' all other property.'* " (Rec., p. 28).

" Q. What do you understand by the meaning of the word ' franchise,' as used by you in your direct examination? A. Well, the sense in which I use it might not be agreed to by lawyers or laymen, without qualification, but I used it in the sense of representing the class of property owned by the Western Union Telegraph Company and controlled by it, *such as privileges and rights to erect and maintain their poles and wires, to carry on their traffic in the different portions of the State of Missouri in connection with their rights to so erect their poles and wires and carry on their traffic wherever else their lines extended in this country*

and other countries, representing a unity of use in the entire corporate property, making the same thereby much more valuable than it otherwise would be for use separately and independently in each territory or country.

"Q. And therefore the privilege to be or to exist does not enter into your idea at all in the matter of values as you have explained by way of franchise? A. Oh, no. As I understand it, the Western Union corporation acquires their right to exist as a corporation from an Act of the Federal Congress; they have this, however, which I did not consider, and that is the right to use the posts of the Federal Government. I did not consider that as an element in fixing the franchise value of property in the use of my term of the word 'franchise,' although it might properly be considered, as the courts have held in a Massachusetts case, but I did not have that in mind when I used the word 'franchise.'" Rec. pp. 29–30).

THEODORE P. COOK, witness on behalf of the plaintiff in error, testified that he is the Superintendent of the defendant Company, having jurisdiction over six States, of which Missouri is one. That he has been continuously in the employment of defendant Company for twenty-eight years, holding different positions. (Rec. p. 34). Witness made up a list of the property owned by defendant in Missouri on June 1st, 1898, other than poles, wires, fastenings, batteries and instruments, and shows that it consisted of horses, wagons and certain furniture. That the greater portion of the property last mentioned was located in St. Louis, Kansas City and St. Joseph, and that it was taxed in those cities and the taxes thereon paid. (Rec. p. 36). That the property of the character last mentioned, owned by defendant in Missouri, outside of the three cities mentioned, on June 1st, 1898, would not exceed $1,000. That the whole of the Company's property in Missouri on June 1st, 1898, other than

poles, wires and instruments would not exceed $5,000 in value. *That the Company does not possess any franchises, ordinances or gifts from the State of Missouri or any of its subdivisions, counties or municipalities, and did not on June 1st, 1898, excepting an ordinance of the city of Columbia, granting the Company the right to put poles on certain streets in that city.* (Rec. p. 38). Witness was familiar with the condition of the Company's plant in Missouri on June 1st, 1898, and with cost of the material and labor necessary to construct that system. That in his judgment the system as it existed on June 1st, 1898, had depreciated to the extent of 65 per cent. That this figure is given as the result of observation and experience on the part of the witness extending through twenty-five years. Witness gives the pole and wire mileage on June 1st, 1898, of defendant in Missouri, and shows in detail the cost per mile of erecting poles and wires and cost at that time of the instruments used in Missouri; and makes the total cost on that date of an absolutely new system equivalent in extent to that actually existing, amount to $984,357.89. That $10,000 added to the sum last mentioned for property owned by the company other than its poles, wires, etc., would represent the actual cost of reproducing on the date mentioned *all the property* of the defendant in Missouri (Rec., pp. 39, 40).

The following certified copy from the RECORD OF THE STATE BOARD OF EQUALIZATION, containing the resolution and entry under which the assessment complained of in this case was made, was offered in evidence as follows :

STATE OF MISSOURI,

Office of State Auditor.

Be it remembered that heretofore, to wit, on the twenty-fifth day of July, 1899, the following, among other proceedings, were had by the State Board of Equalization, viz.:

The State Board of Equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidences of value, and all matters bearing upon the question of the value of the property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Compans, *and the location thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company*, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and of the gross receipts and net earning power, and the franchise and the value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the State Board of Equalization assesses and values for taxes of 1899 the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the State Board of Equalization that the assessed value thereof be distributed upon the said classes of property as follows:

6,075.98 miles of poles, at $71.50 per mile	$434,432.57
23,767.34 miles of wire at $22.02 per mile	523,356.82
2,375 instruments at $5.70 each	13,537.50
All other property at	856,400.56
Total	$1,827,727.45

STATE OF MISSOURI,
Office of State Auditor.

I, JAMES M. SEIBERT, State Auditor of the State of Missouri, do hereby certify that the above and foregoing is a true, full and complete copy of the order of the State Board of Equalization, respecting the assessment of the property of the Western Union Telegraph Company for taxes of 1899, as fully as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State Auditor. Done at office in the City of Jefferson, this 8th day of June, 1900.

J. M. SEIBERT,
State Auditor.

[SEAL.]

Rec., pp. 30-31.

VARIOUS EXHIBITS respecting matters referred to in testimony of witness THEODORE COOK were offered in evidence.

Rec., pp. 31–33; pp. 43–54.

The cause was heard before the Circuit Court of Jackson County, Missouri, which sustained the contention of defendant below, with respect to the item "all other property," and which Court found as a fact that such item embraced franchises derived from the Federal Government, and that the same were non-taxable by reason of such derivation, and found the further fact that the defendant is a Governmental agent and instrument of interstate commerce, exercising its rights in Missouri solely by virtue of such Federal authority.

The remainder of the assessment was sustained by the Court.

THE FINDINGS of the trial Court and declarations of law made are as follows:

"The Court declares the law to be that the assessment and valuation made by the State Board upon the poles, wires and instruments owned by defendant in this State *is final and conclusive and is not subject to review or attack in this suit.*

"From the evidence, the Court finds that the third item of the tax bill sued on designated as 'on all other property' *was intended to embrace the right of the defendant to operate a telegraph system along and over the post roads of the United States,* under a contract between the defendant and the United States, by which contract the United States was given the precedence in the transmission of all messages, and which gave to the United States the right to establish the charges to be paid for such service, and by it the United States is given the right to purchase said system, at any time, at a price to be fixed by a board of arbitrators. On this state of facts, the Court declares the law to be that as to said third item the plaintiff cannot recover.

"The Court declares the law to be that a franchise derived from the United States giving to the defendant the right to construct and operate its telegraph system along the post-roads of the United States is not subject to taxation by the State of Missouri.

"The court declares the law to be that when the defendant accepted the terms of the Act of Congress set out in defendant's answer, and undertook and agreed to place its poles and wires along and over the post roads of the United States, in consideration of which the defendant agreed to give the United States precedence in the transmission of its messages at such price as the United States might name and further agreed to sell its telegraph system at any time to the United States on such terms as a board of arbitrators might determine, the defendant then became an agency of the United States and such privilege or franchise cannot be assessed and taxed by the state of Missouri."

Rec., pp. 55, 56.

Judge HENRY, before whom the case was tried, who made the declarations of law and findings of fact referred to, accompanied them with an opinion (Record

pp. 60–63) in which, referring to the action of the State Board, he says:

"*The State Board of Equalization placed a value on the defendant's telegraph line, its poles, wires and all other property not included in that which the law requires the company to give in to the county assessor*, AND THEN FIXED THE VALUE OF ALL OTHER PROPERTY INCLUDING AND SPECIFYING THE FRANCHISE. In fact, as disclosed by the testimony in the case, there was no other property except the poles, wires and instruments and that which had already been listed with the county assessor. *It was in effect an attempt to tax the franchise as distinct from the visible property*, but whether this is so or not, the entire assessment as to the franchise and the other property, as classified by the State board of equalization, must fall to the ground. For if the franchise is not subject to taxation by the State, and there was other property than that specified in the first class of property valued by the board, the assessment of the franchise and such other property in gross, without a separate valuation of the franchise and the other property, violates the entire assessment as held by the Supreme Court of the United States. It follows that the judgment must be for defendant on that item of plaintiff's demand."

As to the method pursued by the State Board of Assessment in arriving at the valuation and assessment, the validity of which is in question in this case, the Supreme Court of Missouri, in its opinion (Record, p. 75), says:

"In the case at bar the board of equalization *first* ascertained the number of miles of poles and wires and the number of instruments owned by the defendant, and used in this State, *and placed a valuation upon them.* The board *then* considered 'all other property' owned by the defendant located in this State *and put a valuation upon that.* The defendant's evidence shows that it did own other property in this State besides the poles, wire and instruments specially enumerated and valued. But it contends that such other property was worth only one thousand dollars and not $856,400.56, as the board found it to be worth. The utmost that

could therefore be said of this item is that the defendant and the board differed in opinion as to the value of *such* other property, and this being an action at law wherein the defendant attempts to defeat the whole levy, as long as it appears that the defendant owned some property and the only question is whether it was of the one value or the other, the defense must fail, for a court of law has no machinery for determining how much such property was really worth, and in addition if all defendant claims be true it is merely a case of overvaluation and not an erroneous assessment, and under the law of this State mere overvaluation is no defense to a suit upon a tax bill, for section 7579 R. S. 1889 (sec. 9197 R. S. 1899) expressly provides that: 'Valuations placed on property by the assessor or board of equalization shall not be deemed to be erroneous assessments under this section'" (See Appendix).

JUDGMENT was entered by the trial Court in favor of the plaintiff below and against defendant for the sum of $605.82, together with interest, and an allowance of commissions thereon in favor of the collector, and also an attorney's fee to be taxed under the laws of the State of Missouri.

Rec., p. 57.

MOTIONS FOR NEW TRIAL were filed by plaintiff and defendant below.

The only ground of motion for new trial of defendant below to which special attention need be called is the first:

"The uncontradicted evidence shows that the rule for assessing property generally in this state is on a basis not to exceed forty per cent. of its value, while the property of the defendant was assessed by the State Board of Equalization on a basis of full actual value, by which the defendant was denied the equal

protection of the law and was in violation of the Constitution of the United States, as provided by the 14th Amendment thereto."

Rec., p. 58.

Both motions for new trial were overruled by the trial Court.

Rec., pp. 58, 59.

Thereupon both plaintiff and defendant below filed affidavits for appeal to the Supreme Court of the State of Missouri.

Rec., p. 59.

A BILL OF EXCEPTIONS, approved by both parties to the cause, was duly presented, signed and allowed.

Rec., p. 60.

The cause was advanced for hearing in the Supreme Court of the State of Missouri, and afterwards heard.

THE SUPREME COURT reversed and annulled the judgment of the Circuit Court of Jackson County in so far as the latter Court held the item "all other property," $856,400.56, to be unlawful, and affirmed the findings of the Court in so far as the judgment rendered by the Circuit Court of Jackson County was concerned, and thereupon ordered judgment to be entered in favor of the plaintiff below for the sum of $1,027.22, together with the interest thereon, and the costs and charges.

Rec., pp. 66, 67.

A PETITION FOR A WRIT OF ERROR was duly filed in the Supreme Court of the State of Missouri.

Rec., pp. 78, 79.

Thereupon a WRIT OF ERROR was awarded by this Court to the Supreme Court of the State of Missouri, and the cause thus brought to this Court.

Rec., pp. 1, 2.

The usual citation in pursuance of the writ was issued.

Rec., pp. 1, 2.

A bond was given in the sum of $3,000 and approved by the Chief-Justice of the Supreme Court of Missouri.

Rec., pp. 81, 82.

Assignment of Errors.

1. The Supreme Court of Missouri erred in deciding that plaintiff in error was not discriminated against by the State Board of Equalization of Missouri in assessing for purposes of taxation the property of said Western Union Telegraph Company at more than its full and actual value, whereas, said Board intentionally and systematically equalized and adjusted the values of real and personal property generally for purposes of taxation at forty per cent. of the actual value of such property, all of which plaintiff in error set up and claimed was in violation of the 14th Amendment to the Constitution of the United States.

2. The Supreme Court of Missouri erred in refusing to hold that the franchises exercised by plaintiff in error in the State of Missouri were derived wholly from the Constitution of the United States and the Act of Congress approved July 24th, 1866, entitled: "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and that said State Board of Equalization taxed said franchises in violation of the provisions of the Constitution of the United States.

3. The Supreme Court of Missouri erred in refusing to hold that the item involved in the assessment complained of in said cause under the head of "all other

property," and amounting to the sum of $856,400.56, was in fact an assessment of the franchises of plaintiff in error derived from the Federal Government in pursuance of the Constitution of the United States and the Act of Congress mentioned in the error last assigned, and, therefore, violative of the laws of the United States, and of the provisions of the Constitution of the United States.

4. The Supreme Court of Missouri erred in failing to find that the only franchises exercised by plaintiff in error in the State of Missouri were those derived from the Constitution of the United States and the Act of Congress mentioned, and that the same were not subject to taxation by the State of Missouri through said Board of Equalization, or otherwise.

5. The Supreme Court of Missouri, having found and held that plaintiff in error was a Governmental agent and an instrument of inter-state commerce erred in holding that the item " all other property " hereinbefore mentioned did not embrace franchises of plaintiff in error derived from the government of the United States, and that the same had been taxed in said item in violation of the laws of the United States, and of Section 8, Article I., and other provisions of the Constitution of the United States.

6. The Supreme Court of Missouri erred in rendering judment in favor of defendant in error for the amount sued for.

7. The Supreme Court of Missouri erred in refusing to entertain the defense made by plaintiff in error for the assigned reason that no tender of any part of the taxes involved had been made by plaintiff in error to defendant in error.

8. The Supreme Court of Missouri erred in reversing the finding and judgment of the Circuit Court of Jackson County, Missouri.

POINTS AND AUTHORITIES.

I.

The Western Union Telegraph Company is an agent of the Government and an instrument of interstate commerce; and its franchises exercised in Missouri having been derived solely from the Federal Government are exempt from taxation by the taxing authorities of the State.

Pensacola Tel. Co. vs. West. U. Tel. Co., 96 U. S., 1.
Telegraph Co. vs. Texas, 105 U. S., 460.
California vs. Pacific R. R., 127 U. S., 1.
San Francisco vs. West. U. Tel. Co., 96 Cal., 140.
C. P. R. R. vs. California, 162 U. S., 91.
Wabash Ry. Co. vs. Illinois, 118 U. S., 557.
R. R. Co. vs. Peniston, 18 Wall., 5.
Leloup vs. Port of Mobile, 127 U. S., 640.
Robbins vs. Taxing Dist., 120 U. S., 493.
Phil. S. S. Co. vs. Pa., 122 U. S., 344.
West. U. Tel. Co. vs. Pendleton, 122 U. S., 358.

II.

The State Board of Equalization has discriminated against plaintiff in error and in favor of other persons generally. The Board, in order to discriminate as aforesaid, fixed the value of the property of the Western Union Telegraph Company for taxation at far more than its full actual

cash value and intentionally so equalized and adjusted the values of other property throughout the State at 40 per cent. of the actual cash value thereof. The necessary effect of all of which has been that the said company has been discriminated against in violation of the Fourteenth Amendment to the Constitution of the United States.

Pelton vs. National Bank, 101 U. S., 143.
Cummings vs. National Bank, 101 U. S., 153.
National Bank vs. Kimball, 103 U. S., 732.
State ex rel. vs. Cunningham, 153 Mo., 642.
State ex rel. Wright vs. St. L. I. M. & S. Ry. Co., 82 Mo., 683.
State ex rel. vs. Davis, 131 Mo., 457.
Railroad Co. vs. State, 64 Mo., 294.
State vs. Hannibal & St. Joseph R. R. Co., 75 Mo., 208.
Ward vs. Board of Equalization, 135 Mo., 309.
House vs. Clinton Co. Court, 67 Mo., 522.
State ex rel. vs. Board of Equalization, 108 Mo., 235.
State ex rel. vs. Vaile, 122 Mo., 33.
People vs. State Board of Equalization, 191 Ill., 528, 61 N. E., 339.
Ex parte Ft. Smith & Van Buren Bridge Co., 62 Ark., 461; 36 S. W., 1060.
Los Angeles Co. vs. Ballerino, 99 Cal., 597; 32 Pac., 583; 34 Pac., 329.
Pacific Postal Co. vs. Dalton, 109 Cal., 604; 51 Pac., 1072.
Randall vs. City of Bridgeport, 63 Com., 321; 28 Atl., 523.
Board of Supervisors vs. Railroad Co., 44 Ill., 229.

Iowa vs. Dakota Tel. Co. vs. Schauber (Ia.), 91 N. W., 78.
C. B. & Q. R. Co. vs. Board of Comrs., 54 Kans., 786; 39 Pac., 1039.
Merrill vs. Humphrey, 24 Mich., 170.
Walsh vs. King, 74 Mich., 350; 41 N. W., 1080.
State ex rel. vs. Savage (Neb.), 91 N. W., 557.
Manufacturing Co. vs. Strafford, 51 N. H., 455.
Manchester Mills vs. Manchester, 58 N. H., 38.
Mercantile Natl. Bank vs. Mayor, etc., of New York (N. Y.), 64 N. E., 756.
City of Chattanooga vs. Railroad Co., 7 La., 563.
Weeks vs. City of Milwaukee, 10 Wis., 242.
Hersey vs. Supervisors, 16 Wis., 185.
Lefferts vs. Supervisors, 21 Wis., 688.
Iron Co. vs. Hubbard, 29 Wis., 52.
Hersey vs. Board of Supervisors, 37 Wis., 75.
Railroad Tax Cases, 13 Fed., 722.
Second National Bank vs. Caldwell, 13 Fed., 429.
In re Watson, 15 Fed., 511.
California Tax Cases, 18 Fed., 385.
State of Indiana vs. Putnam Palace Car Co., 16 Fed., 193.
Dundee Mortgage Co. vs. School Dist. No. 1, 21 Fed., 151; 24 Fed., 197.
Taylor vs. Louisville & Nashville R. Co., 85 Fed., 302; 88 Fed., 350.
Chicago Union Traction Co. vs. State Board of Equalization, 114 Fed., 557.
Cooley on Taxation, 2 Ed., pp. 748–785.
Judson on Taxation, Sec. 478.
Welty on Assessments, Sec. 186.

III.

Where discrimination of the character mentioned under Point II. exists, it amounts to fraud in law and a denial of equal protection of the law and the Courts will grant relief. Likewise where lack of jurisdiction to make the assessment is shown.

Authorities under Point II. and:

State ex rel. vs. Vaile, 122 Mo., 33.
State ex rel. Love vs. Railroad, 121 Mo., 12.
Black vs. McGonigle, 103 Mo., 192.
State ex rel. Morris vs. Cunningham, 153 Mo., 642.

IV.

In all cases where franchises such as those possessed by the Western Union Telegraph Company have been considered in estimating the value of property assessed and such assessments have been sustained statutes providing for the assessment of corporations under a "unit" system have contained express and detailed provisions for correctly ascertaining the valuation of the property to be assessed. No such provisions are found in the laws of Missouri. The "ways and means" for any such assessment have not been prescribed. Fur-

thermore, the statutes of Missouri exclude any such mode of assessment of telegraph companies.

West. U. Tel. Co. vs. Mass., 125 U. S., 530.
Mass. vs. West. U. Tel. Co., 141 U. S., 40.
W. U. Tel. Co. vs. Taggart, 163 U. S., 1.
State Railroad Tax Cases, 92 U. S., 575.
Pullman Co. vs. Penn., 141 U. S., 18.
Adams Ex. Co. vs. Ohio, 165 U. S., 194, and on rehearing, 166 U. S., 185.
Bridge Co. vs. Kentucky, 166 U. S., 150.
St. Louis vs. Wennecker, 145 Mo., 238.

V.

The franchise of a corporation "to be" a corporation is not taxable in a foreign State in which it is licensed to do business.

London & S. F. Bank vs. Block, Collr., 117 Fed. Rep., 900.

ARGUMENT.

The first contention of the plaintiff in error is that the item in the assessment made by the State Board of Equalization for the taxes of 1899, reading "all other property" at $856,400.56, means franchises, and franchises alone.

Counsel for defendant in error will doubtless admit that the franchises, *eo nomine*, of the telegraph company, were valued and assessed, and that they constituted by far the greatest item, and, perhaps, the only item, covered by the phrase "all other property." But they will, doubtless, likewise insist that the word "franchises" was not regarded by the assessing board in its technical signification, and that it was used simply as a synonym for that vague, shadowy, incorporeal *something* which, like the "unearned increment," is impossible to define, but which, nevertheless, gives actual value to the use of corporeal property, finding its expression in *earning capacity*. This they call the intangible property of the telegraph company, and insist that it is the province of the assessing board to ascertain as best they can, and by whatever groping process they may choose to employ, the value of this intangible property, and that such property, being neither real nor personal, should be taxed at its full value.

Later in this argument we shall endeavor to show that to make available the "unit" rule sanctioned by this Court in such cases as *The Adams Express Company vs. Ohio* (165 U. S., 194) and *Bridge vs. Kentucky* (166 U. S., 150), the *Legislature* of the State should

point out the precise mode of arriving at the values to be placed upon the intangible property of a corporation within the State. In other words, that it is for the *Legislature* to prescribe the *principle* of taxation under the unit rule, in order that the Courts may have some basis for determining whether the mode prescribed is just or unjust. It would make confusion worse confounded if different taxing boards, in secret sessions, could adopt methods peculiar to themselves and unknown to the Courts, differing from time to time as the boards were differently constituted.

When by a divided Court it was decided in *Railroad Company vs. Peniston* (18 Wall., 5) that the property of a corporation created by the Federal Government, such as the Union Pacific Railroad Company, could be taxed, the opinion of the Court was careful to specify that *only the real and personal property of the corporation, as distinguished from its franchises, could be taxed by a State, and that there could be no tax upon the operations of the company.* If the officers of Lincoln County, Nebraska, in addition to rating the tangible property of the railroad company, had undertaken to place a value upon its intangible property, including the *rights* created by Congress, we venture to assert that the opinion in the case of *Railroad Company vs. Peniston* would have been very different, and with no dissentients.

The trial Court, sitting as a trier of the facts (a jury having been waived) *made a specific finding from the evidence* that the item mentioned was intended to, and did, embrace the right of the defendant to operate its system over and along the post-roads of the United States under its grant from and contract with the Government, and, therefore, that the item embraced the

"franchises" granted by the Government to plaintiff in error; and we submit from the evidence that such is the only finding that could have been made (Rec., pp. 56, 63). The uncontradicted testimony of Mr. Cook, for many years an officer of plaintiff in error, shows that it possessed no real estate in Missouri, and that on June 1st, 1898, its entire property in that State consisted of certain poles, wires and instruments, constituting what may be termed its plant, and in addition thereto certain personal property, all of which was specifically enumerated, of the character of horses, wagons, furniture, etc. (Rec., pp. 35–42).

We print in an appendix hereto the statutes of the State of Missouri relating to the powers and duties of the board of equalization, and the mode of taxation of property generally, and railroads and telegraphs (Sec. 9387 R. S. of Missouri, 1889, 2 vol., p. 2181; R. S., Sec. 9360, p. 2174).

Section 9387, R. S. Mo., 1899, provides that all property real and personal, including franchises owned by telegraph and express companies, shall be subject to assessment by the State Board of Equalization *in the same manner as railroad property, and to the same extent as the property of private persons.* Section 9360, R. S. Mo., covering railroads, and by adoption telegraph companies, provides that all property, which we may designate as locally situated, such as horses, wagons, furniture, money, etc., of companies such as the Western Union Telegraph Company, *shall be assessed by local taxing boards.* The testimony in the case showed that all *such* property, barring, perhaps, $1,000 worth, distributed throughout the State, *was assessed and taxes paid thereon for 1899* (Rec., pp. 35, 36, 37). So far, therefore, as corporeal property is con-

2304

cerned, we have only to deal with the company's general plant, consisting of its poles, wires and instruments. As shown by the official record of the Board, this plant of the company, consisting, as mentioned, solely of poles, wires and instruments, was assessed by the Board, which divided the same into three classes, imposing separate and distinct values upon the poles, wires and instruments respectively (Rec., p. 30). The same record shows the fourth item of "all other property" mentioned. It also shows and the testimony of Secretary of State LESUEUR, and Attorney General CROW, two of the five members of the Missouri State Board of Equalization, sustained its recital, that franchises were considered in the assessment that was made. This testimony on the part of the Secretary of State and Attorney-General is set forth in the abstract of the testimony which precedes this argument. The Attorney-General admitted that the assessment for 1899 was largely in excess of other years, and that franchises constituted a "considerable element of the item all other property" (Rec., p. 28).

We think it has been absolutely demonstrated that not only did franchises constitute a considerable portion of the item mentioned, but that the item consists *of franchises, and franchises alone.* The question then arises as to what franchises the Western Union Telegraph Company possesses, and what, if any, portion of such franchises may be taxed under the Missouri statute, which, as shown, specifically includes "franchises" in the classes of property of Telegraph Companies to be taxed. No argument is necessary to sustain the rule, so often laid down by this Court, that the State has the power to tax such franchises only as it controls; nor the converse, that States have no right

to tax, or in any way burden franchises which emanate alone from Federal grant.

It was admitted that the Western Union Telegraph Company is a corporation of the State of New York, and that it is not organized under the Laws of Missouri, and has not secured a license to do business within the State under the statute permitting foreign corporations to secure such license and enjoy the privileges and incur the obligations of Missouri corporations (Rec., p. 16). It was further admitted that the Telegraph Company accepted the provisions of the Act of Congress approved July 24th, 1866 (U. S. Statutes at large, 1865–1867, pp. 221 and 222), and that such acceptance has never been withdrawn. (Said Act reprinted in APPENDIX hereto.) Briefly, that Act of Congress gives the company the *right* to maintain its system of telegraph along the post-roads of the United States, embracing all public roads and highways, and over, under and across the navigable streams of the United States, and, under severe penalties, requires the company to transmit and give priority to messages of the Government between its various departments, officers and agents, at rates annually fixed by the Postmaster-General. The company, by acceptance of this act, also agrees that the Government may at any time purchase the entire system of the company upon a valuation to be fixed by appraisers. Plaintiff in error showed affirmatively that *it did not possess a single franchise granted by the State of Missouri*, or any of its territorial subdivisions other than perhaps in one small instance where one of the towns of the State, by ordinance, gave the company the right to set its poles along certain streets (Rec., p. 38). This right, as has been repeatedly held, the company possessed under its Fed-

eral grant, giving it the right to place its poles along the streets, highways, etc., for, by an Act of Congress, all streets, highways, etc., are declared post-roads.

It is unnecessary to refer to any other case than that of City of St. Louis vs. Western Union Telegraph Company (148 U. S., 92), in which, among other things, Mr. Justice BREWER said (pp. 104, 105):

"Indeed, it may be observed in the line of the thoughts heretofore expressed that this charge is one in the nature of rental; that the occupation by this interstate commerce company of the streets *cannot be denied by the city;* that all it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things, that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."

The Statutes of Missouri with respect to telegraph companies limit the franchises given by those acts to telegraph companies organized under the Laws of Missouri, and this has been the law ever since the revision of the statutes in 1865, Chapter 65, page 349, Section 5 (See Appendix for Sec. 5, Act of 1865). It is true, therefore, that every franchise of the company, by virtue of which it carries on its business in the State of Missouri, is in pursuance of the Constitution of the United States and of the Act of Congress mentioned, under which it becomes an instrument of interstate commerce and a Government agent.

This has been decided many times, but it will suffice to call attention to some of the cases decided by this Court, whose decisions with respect to this company as an instrument of interstate commerce and govern-

mental agent is, of course, the law for all the Courts of the Union, State and Federal.

In *Pensacola Telegraph Company vs. Western Union Telegraph Company*, 96 U. S., 1, this Court held that the Act of Congress of July 24th, 1866, is a legitimate regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of Congress over the postal service, and the opinion holds that such power is not limited to such military or post-roads as are on the Public Domain.

The case of *The Telegraph Company vs. Texas*, 105 U. S., page 464, where the Court say :

" A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. * * * Congress, to facilitate the erection of telegraph lines, has authorized the use of the public domain and the military and post-roads for that purpose. As a return for that privilege, those who avail themselves of it are bound to give the United States precedence in the use of their line for public business at rates to be fixed by the Postmaster General. *Thus, as to government business, companies of this class become government agencies.* The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, *and of a government agent for the transmission of messages on public business.*"

The trial Court, *with which, of course, rested the determination of the facts,* expressly found, under the stipulation contained in the record, that plaintiff in error was an agent of the Government (Rec. p. 56). The Supreme Court of Missouri, in its opinion, expressly finds that plaintiff in error never received any authority or right

from the State of Missouri to do business in that State, or to erect its poles or wires upon or over the public highways and places in the State; that it does not fall within the statute of the State granting such franchises, for the reason that such grant is expressly limited to *telegraph companies organized under the laws of the State*, and further finds "*the defendant's sole right* to do business in Missouri arises out of the Act of Congress approved July 24th, 1866" (Rec., p. 72). That Court further declares that, as the plaintiff in error has accepted the provisions of the Act of Congress mentioned, and agreed to transmit messages for the Government at rates fixed by its officers, it is, "as to Government business, a Government agency" (Rec., p. 72). While the language of the Supreme Court of Missouri, declaring that plaintiff in error is a Government agency as to Government business, is emphasized in its opinion, we do not see how plaintiff in error could be a governmental agency as to any other business.

The only significance of the claim which plaintiff in error has repeatedly made, and which has been established by this Court, that it is a governmental agency possessing franchises entitling it to carry on its business along military and post roads and across navigable streams, etc., all within the jurisdiction and control of the Federal Government, is that these rights which it possesses from the Government, and for which it renders the highly valuable service and incurs the obligations mentioned, cannot be taxed or in any manner impaired or interfered with by State authority. And no contention is now made that, even though it be a governmental agency and possessed of these franchises, its ordinary, tangible *property* within

or under the control of the State of Missouri is not subject to taxation (quoting the language of the Missouri statute on the subject) "the same as the property of private persons."

That the Western Union Telegraph Company is an instrument of interstate commerce the authorities expressly declare. Under the Constitution of the United States, Congress alone has power to impose burdens upon interstate commerce; otherwise it would be within the power of a State to exclude such instruments from its domain. It will suffice to mention some of the cases decided by this Court sustaining this rule, which is elemental as a matter of construction of the Federal Constitution:

Wabash Ry. Co. vs. State of Illinois, 118 U. S., 557.
R. R. Co. vs. Peniston, 18 Wall., 5.
Leloup vs. Port of Mobile, 127 U. S., 640.
Robbins vs. Taxing Dist., 120 U. S., 493.
Philadelphia S. S. Co. vs. Pa., 122 U. S., 344.

In the *Western Union Telegraph Company vs. Pendleton*, 122 U. S., at page 358, the Supreme Court, referring to many cases on the subject of the power of States with respect to instruments of interstate commerce, declares telegraphic communication between the States to be interstate commerce, within the meaning of the Federal Constitution, and that it can be in no wise burdened by State authority. The Court say:

"In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the States is affirmed whenever that body chooses to exert its power, and it is

also held that the States can impose no impediment to the freedom of that commerce."

It is the result of the authorities that no burden can be placed upon an agent of the Government, or of interstate commerce, and hence not upon its franchises. For, as was said by Chief Justice MARSHALL, in *McCulloch vs. Maryland:*

"The power to tax involves the power to destroy, and if such power was possessed by the States it would rest with them whether any instrument of interstate commerce should be allowed within their borders."

The proceedings of the State Board of Equalization show that the board divided the property which they assessed, at an aggregate of more than $1,800,000, into four classes, but specifically assessed under a separate and distinct class "all other property" which, *as has been proved and found, means franchises.*

Counsel in the courts below referred, and doubtless here will refer, to the well-known cases in this Court of *Massachusetts vs. Western Union Telegraph Company*, 125 U. S., 530 and the second *Massachusetts Case*, 141 U. S., 40; *Western Union vs. Taggart*, 163 U. S., 1; *Henderson Bridge Company vs. Kentucky*, 166 U. S., and the *Adams Express cases*, in the same volume and volume 165, to sustain the right of the State to take into consideration franchises in fixing the value of the property of companies, such as the Western Union, for the purposes of taxation. Those cases arose under State statutes prescribing with the utmost detail the manner in which the taxing board should reach the *value of the company's property*, and taxation thereunder has been sustained for the reason, *expressed in*

every case, that such taxation was *not* upon franchises granted by *Federal* authority, but was, *in fact*, upon the *real and personal property* of the companies. No such scheme of taxation of the property of telegraph companies is provided for by the statutes of Missouri. On the contrary, those statutes expressly provide for the separate and distinct assessment and valuation of the *tangible* property and *State* franchises. It will be seen, by reference, that this is the scheme of taxation of the Missouri statutes printed in the appendix. The point to notice here is that these statutes do not provide for assessing railway property, including its franchises, on the unit principle, and failing so to provide, that principle of taxation is excluded and inconsistent with the provisions of the statutes themselves.

Statutes which enact the unit principle of valuation of the entire property of a corporation must make provision for excluding from the valuation to be fixed all extra-territorial property and all property which is locally assessed at its full value (and which, if included, would mean double taxation), as well as property which is exempt from taxation. And the importance of having such provision clearly made *by law* is forcibly shown by the Missouri taxing laws, which have been referred to. *We have shown that the ordinary property of the company which is locally situated can only be assessed and taxed by local boards*, and that, therefore, the State Board can only tax the general plant of the company. Therefore, any law which would subject the company to taxation on what has been styled the unit or mileage basis *must provide* not only for the exclusion of the company's property locally taxed in Missouri, but such property in other States, as well as any exempt property that it may have. Mr. Justice BREWER, in the

opinion on the rehearing of the *Adams Express case*, 166 U. S., 185, says :

" If half of the property of the Adams Express Company, which by its own showing is worth '16 millions of dollars and over, is invested in United States bonds, and, therefore, exempt from taxation, or invested in any way outside the business of the company so as to be subject to purely local taxation, let that fact be disclosed, and then if the State of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That, *if such facts exist, they must be taken into consideration by a state in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this court.*"

And a number of cases decided by the Supreme Court of the United States is cited in support of the language used.

In reaching a valuation to be placed on the property of a company whose business and property extend through every State and Territory of the Union, many matters of detail must be considered, and it is necessary not only as a matter of fairness, but as a matter of law, that the *method* of reaching such a conclusion *shall be prescribed by law*, and not left to the arbitrary judgment or guess of an assessing board. The necessity for this must be apparent to any one familiar with the subject. While it is true that in valuing property, for illustration, of a telegraph company, the value of its poles, wires and instruments may not alone constitute the full value of the company's property in a State, and the full value may be fixed and taxes assessed thereon, such valuation cannot be *arbitrarily* made but must be reached through prescribed and certain methods, as an examination of the statutes of Massachusetts, Ohio, Illinois, Indiana and Kentucky, to be found in the

reports of this Court, in cases mentioned, will show. The statutes of Missousi, under which telegraph companies are taxed, make no provision whatever for the manner in which franchises shall be ascertained or taxed, and even though such franchises were taxable, the Legislature not having prescribed the manner in which their value shall be ascertained, no assessment on the unit plan can be made.

In *St. Louis vs. Wennecker*, 145 Mo., 235, the Supreme Court of Missouri say :

> " The legislature must provide for the taxation of property ; the ' ways and means ' for the assessment thereof must be prescribed by law. Omissions in that behalf cannot be supplied by the courts."

And we may add that it is equally true that omissions in that behalf cannot be supplied by any rules adopted by the assessing authorities, and this limitation likewise applies to assessing boards ; otherwise a special tribunal of very limited jurisdiction would have powers to adopt or invent machinery not possessed by a court of general jurisdiction.

It is perfectly established by the testimony that the item " all other property " must have referred, and did refer solely to franchises. The use of the phrase " all other property " was evidently made by the State Board to conceal the fact that it alone covered franchises, as it doubtless knew that the company exercised no franchises in Missouri emanating from the State, or that could be the subject of taxation as such. Our inference in this respect is not mere guesswork, but is known to all who have had occasion to consider the actions of boards of equalization or taxation in these matters. Judson, in his work on Taxation in Missouri, at page 295, speaking on this subject, says :

"While these boards decline to tax franchises specifically as such, it is clear from the valuations made by the State Board that the earning power of the properties, that is the value in use of the tangible and intangible property of both railroads and street railroads must have been considered. *This is only another name for the taxation of franchises.*"

We again remark that the absolute proof in this case coming mainly from the officers of the State Board does not leave the item in controversy open to question, but shows that it consists of franchises alone.

Did the State Board of Equalization have power to tax the franchises of the Western Union Telegraph Company?

On this subject we have the decision of this Court, which is the law, as we understand it, to-day.

This Court in *California vs. Pacific Railroad Company*, 127 U. S., 1, has laid down the law with respect to taxation by a State of franchises granted by the Federal Government, and which, we submit, is decisive of the question now under consideration.

Incidentally, we may remark in advance that the case last cited also meets a suggestion made in the lower courts, that the telegraph company was a mere contractor inasmuch as the Government had no interest in its earnings, and shows that such is not the fact.

The California case involved the taxation of Governmental franchises granted to a railroad whose main business, like that of the telegraph company, was serving the general public, and it was expressly held that the assessment was void because in the taxation of the company's franchises, *some of which were derived from the State*, the Governmental franchises were included. The present case is much stronger for the reason that all of the franchises sought to be taxed are derived ex-

clusively from the General Government. We quote from the case mentioned as follows :

"Assuming then that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the state. *They were granted to the company for national purposes and to subserve national ends.* It seems very clear that the state of California can neither take them away, nor destroy, nor abridge then, nor cripple them by onerous burdens. Can it tax them? *It may undoubtedly tax outside visible property of the company situated within the state. That is a different thing. But, may it tax franchises which are the grant of the United States? In our judgment it cannot.*"

And, after defining the meaning of a franchise, the Court proceed :

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a state, without the consent of Congress? Taxation is a burden and may be laid so heavily as to destroy the thing taxed or render it valueless. As said by Chief-Justice MARSHALL in McCulloch vs. Maryland, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, *it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state.* The power conferred emanates from and is a portion of the power of the government that confers it. *To tax is not only derogatory to the dignity but subversive of the powers of the Government and repugnant to its paramount sovereignty.* It is unnecessary to cite cases on, this subject."

In *Central Pacific Railraod Company vs. California* 162 U. S. 91, this Court was called upon to consider the question as to whether an assessment imposed by the State of California upon the franchises of the Railroad Company could be sustained. The company was

required under the laws of California to make return of its property and franchises for taxation. It was organized under the laws of California and derived its ordinary franchises from that State. It also had franchises which were granted it by the Federal Government. Inasmuch as in its return it simply fixed a gross sum for the valuation of its franchises *and did not distinguish or attempt to distinguish between State and Federal franchises, and inasmuch as the lower Court found as a matter of fact that the franchises returned were those granted by the State,* the Supreme Court of the United States sustained the taxes, holding that the company was estopped from denying that the return made by it was of property properly subject to taxation, and that the presumption existed that the franchises which it returned for taxation were not those exempt under the laws of the United States. This case, however, expressly reaffirms that in the 127 U. S., from which we have quoted, and is renewed authority for our position that Federal franchises as such cannot be taxed.

This question involving franchises of the Western Union Telegraph Company has also been determined in the Supreme Court of California in the case of *San Francisco vs. Western Union Telegraph Company,* 96 Cal. 140, and the opinion contains an analysis of the then existing Federal cases upon the question. That Court held that, as the Western Union was an instrument employed by the Government for carrying into effect its sovereign power, it was beyond the power of the State to levy a tax upon its franchises *in addition to the taxes which, in common with others,* it paid upon its property.

Analysis of and Comments on the Opinion of the Supreme Court of Missouri in This Case.

Let us now analyze the opinion in this case of the Supreme Court of Missouri, and see how the branch of the case now under discussion has been met. That Court expressly finds that the Western Union Company is not organized under the laws of Missouri, and that it has never received any authority or right from the State to do business in the State, or erect its plant therein; that the franchises given by the laws of Missouri to Telegraph Companies are expressly limited to such companies as are organized under the laws of the State; that "the defendant's sole right to do business in Missouri arises out of the Act of Congress, approved July 14th, 1866;" that, as stipulated in the case, the company accepted the provisions of the act, and has ever since been operating under it; that the act is a legitimate regulation of commerce and constitutes the company as to government business a government agency, and an instrument of interstate commerce (Rec., p. 72). Recital is also made as to the express finding of the lower Court, as trier of the facts, that the item in controversy "all other property" included franchises derived from the Federal Government, and, therefore, non-taxable, and that the company is a governmental agent and instrument of interstate commerce. But the Supreme Court held that the trial Court was in error in holding that the defendant derived its franchise, that is, its right to exist and be a corporation and do a telegraph business, from the Government. That such franchise was derived from the State of New York and not from the Government;

that "neither the act of Congress of 1864 (1866) nor its acceptance by the defendant created the defendant or gave it the right to do business" (Rec., p. 76). And the conclusion is, *therefore*, reached that, in determining the value of the property of the company in Missouri, the Board of Equalization took into consideration the various matters recited in their record, but "it did not and could not have included therein any franchises derived by the defendant from the Government of the United States *because that Government had conferred no such franchises, nor was such a valuation placed upon 'all other property' a tax upon the franchises of the defendant company*" (Rec., pp. 76, 77).

Upon what evidence in the case can such a finding rest? The record shows conclusively that no franchises from the State of Missouri are exercised in that State by plaintiff in error by virtue of any grant of the State of Missouri, and the laws of Missouri expressly forbid an ordinary foreign corporation to do business within the State excepting upon terms and conditions which are common to corporations created by the State of Missouri, and for which right express license must be secured. The testimony of Attorney-General CROW shows that the franchise of the Western Union under the laws of New York to be a corporation was *not* considered (Rec., p. 29), and his testimony and the testimony of the Secretary of State show *that franchises were considered and valued*, and we submit there could have been no other franchises than those granted by the Federal Government. Under the law as laid down in *London Bank vs. Black*, 117 Fed. Rep., 900, the New York franchise was not subject to taxation. "But," say the Supreme Court of Missouri, "in the item 'all other prop-

erty complained of the telegraph company admits that it did have in Missouri some other property which did not constitute a part of its general plant of poles, wires and instruments, and which had not been locally assessed, which was of the value of perhaps $500 to $1,000" (Rec., p. 75). All of this property is shown, by the testimony of Mr. Cook and the schedules furnished by him, to have consisted of property which is subject, under the laws of Missouri, *to local assessment and local assessment only, and to be in nowise property which could, under the laws of Missouri, have been considered by the State Board of Equalization in making its assessment.* We recall to the Court the section of the Revised Statutes of Missouri, to which we have heretofore referred providing for the assessment of the property of telegraph companies in the same manner as that of railroads, and which expressly requires that property of the character mentioned, being such as furniture, horses, wagons, tools, etc., shall be subject to local assessment by the local assessing authorities. There is no force in the position taken by the Supreme Court of Missouri that this property (too small, perhaps, to have been considered by the local authorities, such as an old desk in some country office, and an old stove in another country office and matters of that nature), *could* have been a portion of the $856,000 item complained of. Such being the *fact*, there was no "error of judgment" on the part of the State Board with respect thereto, and it follows, of course, that it was not necessary that the telegraph company should have tendered any tax, or have made any tender with respect to taxes upon such items. For the Supreme Court of Missouri to declare that the

discrepancy between a sworn value of $1,000 and an estimated value of $856,400, representing such miscellaneous items as desks, chairs, mules, wagons, &c., *was an error of judgment simply*, and uphold the action of the board on this ground, is, to say the least, a strain on judicial dignity.

Again, the suggestion is made in the opinion of the Supreme Court of Missouri that this defense is of an *equitable* nature, and could not be made excepting upon the condition that the conceded amount justly due be first tendered. The present case is purely one of law, the suit being an ordinary action at law upon a tax bill. *Under the Missouri practice defenses may be made of of both a legal and equitable nature.* The defense made with respect to the $856,000 item "all other property" is purely a defense in law, as it squarely attacks the validity in law of the item complained of, specifically made a part of the finding of the board, and the basis for an assessment thereon.

IN CONCLUSION upon this point, we therefore submit:

FIRST. That the proof and findings and opinion of the trial Court show the item of "all other property" to mean franchises alone.

SECOND. That franchises have been separately and specifically assessed by the State Board.

THIRD. That in all the Federal cases referred to where taxation has been sustained, although the value of the property has involved increasing value through franchises, the taxation has been sustained because upon actual *property alone.*

FOURTH. That in every one of the cases last referred to statutes have existed providing specific rules, modes and principles for ascertaining the valuation of the property.

FIFTH. That under the ruling of this Court in the *Adams Express case*, 166 U. S., 227, and of the Supreme Court of Missouri in the *Wennecker case (supra)*, it is *necessary* that the Legislature *prescribe the method* for ascertaining such valuation.

SIXTH. That no such method as was pursued in this case has been prescribed or is authorized by the laws of Missouri.

SEVENTH. That under the Federal and State decisions the franchises of the Western Union Telegraph Company derived from the Government cannot be taxed by a State.

EIGHTH. That its right *to be*, a franchise derived from the State of New York, cannot be taxed as property by the State of Missouri.

Unjust and Illegal Discrimination against the Defendant.

The defendant below in its answer set up the defense that the officers who are appointed to make assessments combined together and established a rule or principle of valuation which imposed a tax upon the defendant's personal property much higher than upon other personal property, and a rate grossly in excess of the average rate.

This defense, as stated in the answer, is as follows:

"Defendant avers that said State Board of Equalization, with a full knowledge of the values of said poles, wires and instruments, and with intent to injure this defendant by compelling it to pay an excessive and disproportionate share of state and local taxes, discriminated against this defendant, well knowing at the time that they were so doing, and so as aforesaid assessed the poles, wires and instruments of this defendant at far more than their true and actual value.

"Defendant avers that under the law it was the duty of said Board of Equalization to adjust and equalize as aforesaid the valuation of all real and personal property in the state of Missouri among the several counties in the state, and that during the period aforesaid it did so proceed to adjust and equalize such valuations. That said State Board of Equalization, by common arrangement, understanding and purpose among themselves, in fact did during the period aforesaid, in violation of the constitution and laws of said state of Missouri, with intent to compel defendant to pay a greater proportion of taxes than the owners of other real and personal property in said state of Missouri, assess all property, to wit, other than the property of Telegraph Companies, at, to wit, from thirty-five to forty per cent. of its true value, whereby as to taxes levied upon real and personal property other than telegraph property in the state of Missouri this defendant was unlawfully and wrongfully discriminated against to the extent of sixty per cent. of the amount of taxes assessed by said State Board of Equalization and levied by the taxing officers of the state upon defendant in pursuance of such assessment" (Rec., p. 9).

This defense was established *in point of fact.* Its effect *in point of law* was, however, denied by the Supreme Court of the State.

The matters which have been set forth and proved in this cause as a defense to the action at law to recover the taxes assessed, have been repeatedly held sufficient to entitle one, against whom there has been an unlawful discrimination, to defend against the tax.

The Supreme Court of Missouri recognized the

authority of the long line of cases which hold that discrimination by officers imposing the tax, or making the assessment, is as pernicious as discrimination by statutory enactment, and in the opinion of MARSHALL, J., an extract from the opinion of Mr. Justice MILLER, in National Bank vs. Kimball (103 U. S., 732), is quoted with approval (165 Mo., 509). (Reprinted, Rec., pp. 67–78.)

The Missouri Supreme Court, in the case at bar, hold, however, that the defendant could not avail himself of this doctrine for two reasons. On page 516 MARSHALL, J. (reprinted in the Record at p. 71), said :

"The defendant has not brought itself within the rule announced in those cases, for it has shown no combination among assessors and no course of conduct among them to discriminate against the defendant or other telegraph companies and other property generally. It has only shown by the testimony of one member of the state board of equalization, that, in his judgment, the valuation put upon property generally is only 35 or 40 per cent. of its true value. The law contemplates that for purposes of taxation, property shall be assessed at its true value in money (Rev. St., 1899, Sec. 9180), and it also presumes that all officers do their duty (Agan v. Shannon, 103 Mo., 661 ; State v. Bank of Neosha, 120 Mo., 161 ; Matthias v. O'Neill, 94 Mo., 520). The evidence adduced is not sufficient to overthrow this presumption, nor to establish a combination or unlawful course of conduct. It is only enough to show what the witness believed to be the value of the property, but not enough to convict the local assessors of intentional or systematic violation of duty."

A second reason advanced by the learned Judge, why this defendant could not avail itself of the defense of overvaluation and discrimination, is stated on page 517 (Record, p. 71) :

"The defendant cannot avail itself of these cases, for the reason, first, that it seeks to raise the question

of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization; second, that such questions can only be raised by a direct attack in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collections of the excess restrained."

This second reason is gratuitously advanced by the Court, for the decision of the case at bar was squarely and distinctly upon the ground that this defendant had not brought itself within the rule laid down by Mr. Justice MILLER. The objection that the illegality of the assessment could not be raised in defense of this kind of a suit is as applicable to the defense that the franchise granted by the United States cannot be taxed, as it is to the defense of unlawful discrimination. Both defenses were denied by the Supreme Court in the case at bar, not on the ground that they could not be pleaded in this action, but because, in the one case, the tax upon "all other property," whether upon the franchise or not, is legal, and in the other case, because the facts did not bring the defense within the rule. Though gratuitous, the suggestion that the finding of a board of equalization cannot be attacked collaterally, will first be considered.

II.

The defendant was entitled to defend against the wrongful assessment in the present action at law to enforce the tax. A bill in equity by the defendant is not necessary in an action like the present.

In the Kentucky railroad tax case, 115 U. S., 321, it was said by Mr. Justice MATTHEWS, delivering the opinion of the Court (p. 335):

"But whatever relief courts of justice may afford against the injuries apprehended, when in fact they have resulted, is secured to the plaintiffs in error by the very statutes of which they complain. For the valuation of railroad property under that act, and the assessment of the taxes thereon, are not final, in the sense that they constitute a charge upon the property subject to the tax, or a liability fixed upon the corporation owning it. That result can be attained and the tax actually collected only by suit, as provided in the fifth section of the statute, either against the officers of the companies for penalties incurred by a failure to pay the taxes levied, or for the recovery of the taxes themselves, by action in the Franklin Circuit Court, or in the courts having jurisdiction in the counties, for the taxes payable to them respectively. The case is thus brought directly and distinctly within the decision in Davidson vs. New Orleans, 96 U. S., 97, 104, where it was held 'that whenever by the laws of a state, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.' * * * What inqui-

ries may be permitted in such cases, of course, is a matter that depends upon the particular provisions of the law of the jurisdiction. In the absence of such provisions, and as a principle of general jurisprudence, it is safe to say that any defense is admissible which establishes the illegality of the proceeding resulting in the alleged assessment, whether because it is in violation of the local law which is relied on as conferring the authority upon which it is based, or because it constitutes a denial of a right secured to the party complaining by the Constitution of the United States."

The county collector is empowered to use all lawfu means to collect all taxes which he is required to collect in his county (Sec. 9228, R. S., Mo., 1899. See Appendix). *A suit at law is one method.* The summary enforcement of the lien by seizure of the goods liable for taxes is another. *It is in this latter extraordinary mode of enforcing payment that the tax-payer has recourse to a bill in equity. There is no occasion for a bill in equity if the collector attempts to collect the taxes by an ordinary civil suit. In such a proceeding the tax-payer may interpose as a defense the illegality of the assessment.*

In the case of *State ex rel. vs. Cunningham*, 153 Mo., 642, 654, it was held that the taxpayer could, as a matter of defense to a suit at law for the taxes, *plead those facts which would have entitled him to equitable relief.* In that case the board of equalization raised Cunningham's assessment, as they had a right to do, but they falsified the record and thus rendered the assessment void. In that case the record showed that the valuation had been increased, when, in fact, other property was added. It was held that this defense of fraud, having been established by the evidence, amounted to a compete defense to the suit, and the finding and final judgment was given for the defend-

ant. *In the Cunningham case, not a word is said about the defendant paying into Court any part of the assessment, as a prerequisite to relief from an illegal assessment.* And on general principles of law such a tender is only required when the complaint seeks affirmative equitable relief and then only on the ground that "he who seeks equity must do equity."

IN THE CASE AT BAR THE ASSESSMENT IS MADE, IN THE FIRST INSTANCE, BY THE BOARD OF EQUALIZATION. Under the provisions of Article IX., Revised Statues of Missouri, 1899, telegraph companies are assessed in the same manner that railroad companies are assessed (see Statute of Missouri in Appendix to this brief). Under the law providing for assessing railroad property, the county assessor has nothing to do with the making of the assessment. *State ex rel. Wright vs. St. Louis, Iron Mountain & So. Ry. Co.*, 82 Mo., 683.

It is difficult to understand how the Supreme Court of the State could say that this defendant "has shown no combination among assessors and no course of conduct among them to discriminate against defendant" (Rec., p. 71). The matter of assessing the telegraph companies is not one in which the county assessors have any part whatever. This board can add to, or subtract from, the value given by the telegraph company; it can add other property which it is authorized to assess and which is not listed by the company in its report to the auditor. From the report of the Board of Equalization, there is no appeal to any other body or board, and the only relief a taxpayer can obtain against an illegal assessment is to sue or be sued.

Article 10, Section 3 of the Constitution of Missouri provides,

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

SEC. 4. "All property subject to taxation shall be taxed in proportion to its value."

Section 9127 of the Revised Statutes of Missouri, 1899, prescribes the duties of the State Board with respect to general real and personal property and provides,

"It shall add to the valuation of each class of the property, real or personal, of each county, which it believes to be valued below its real value in money such percentum as will increase the same in each case to its true value" (see Appendix).

Section 9387, R. S., 1899 (see Appendix), which is the section under which the property of telegraph companies is taxed by the State Board, * * *

"all property, real and personal, including the franchises owned by Telegraph and Express Companies shall be subject to taxation for State, County, Municipal and other local purposes *to the same extent as the property of private persons*, and taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for taxation of railroad property in this State, and County Courts and the court and State Boards of Equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting taxes on the property set forth in this section, as said Courts and Boards of Equalization have or may hereafter be empowered with in assessing, equalizing and adjusting taxes of railroad property, and the president or other chief officer of any such Bridge, Telegraph or Express Company * * * is hereby required to render statements of the property of such Bridge, Telegraph or Express Company in like manner as the president or other chief officer of the Railroad Company is now or may hereafter be required to render for the taxation of railroad property."

Does this not exclude the unit rule as to telegraph companies in other States?

If the action of the Board of Equalization in assessing the property of this defendant in the one hundred and one counties of the State of Missouri where it operates lines, at more than double the value at which the county assessors assess the property of other persons, *and at more than double the value at which this same board of equalization equalizes the value of all other property in every county of the State*, is not common action, concerted action, under a rule of discrimination, it is difficult to understand what kind of discrimination would entitle the defendant to complain. It is not a case of a tax-payer in Jackson County complaining of the assessment in one isolated case. THE PROPERTY OF THIS COMPANY IS SHOWN TO HAVE BEEN ASSESSED AT THIS EXCESSIVE VALUE IN EVERY COUNTY BY THE BOARD SITTING AS AN ORIGINAL AND FINAL ASSESSING BOARD FROM WHOSE ACTION NO REVISION OR APPEAL IS PROVIDED BY STATUTE.

A tax bill is not conclusive. In actions against railroads the tax bill is not even *prima facie* evidence since, it is not made so by statute (*State ex rel. vs. Davis*, 131 Mo., 457). Since taxes levied on telegraph companies are levied and collected in the same manner as in the case of railroad property, the bill for taxes does not constitute even *prima facie* evidence. Hence the stipulation filed in this case (Rec., p. 16). Whatever may be true of the decisions of the board *sitting as a board of equalization* in respect to the decisions of that body being in the nature of judicial decisions, that same commentary cannot be passed upon the action of the board *sitting as a board of assessors*. While it is true that a mode of reviewing the decision is to be had on

a writ of *certiorari*, that writ cannot afford relief where the illegality of the assessment does not appear on the face of the record of the board's proceedings.

It is often said that the writ of *certiorari* is the only proper mode of reviewing the decision of the board of equalization. This writ, however, does not bring before the higher court any of the evidence. It brings up only the *record and proceedings*, thus presenting to the Court only the question of *formal* compliance with the law. *All questions of fraud, discrimination and abuse of discretion which affect the legality of the tax, may be raised in a defense to a suit for the collection of the tax.*

Railroad Co. vs. State, 64 Mo., 294.

Ward vs. Board of Equalization, 135 Mo., 309.
State ex rel. vs. Cunningham, 153 Mo., 643.
House vs. Clinton Co. Court, 67 Mo., 522.
State ex rel. vs. Board of Equalization, 108 Mo., 235.
State ex rel. vs. Vaile, 122 Mo., 33.

In the last-named case the Court said: "Where a board of equalization raises an assessment without jurisdiction, its action is void, and there is a good defense *pro tanto* in a suit to recover the taxes (*State ex rel. v. County Commissioners*, 14 Nev., 140); or, the collection of the taxes on the increased valuation may be enjoined (*Coolbaugh v. Huck*, 86 Ill., 600); or, if paid, may be recovered back (*Avery v. East Saginaw*, 44 Mich., 587)."

As was said in *Chicago Union Traction Co. vs. State Board of Equalization*, 114 Fed., 557, this is not a suit in equity in which the defendant, as a condition for the relief granted, may be required to do equity. It does not lie in the mouth of the State or collector

to say that a defendant cannot defend against an illegal tax because he has not tendered a sum deemed to be justly due, *because the State has taken the initiative to collect the whole of a tax based upon an illegal assessment.* If the contention were correct, the trial Judge erred in giving judgment for a part only of the tax bill, and the Supreme Court should have reversed this judgment on this ground alone.

With still less right could such a replication be made when the Courts have assumed the right to bring about the result of a new assessment by their judgments. It may be that in a suit at law such as this judgment could be given for the sum that would be actually due on a legal assessment. This defendant does not contend that it should be relieved from the payment of any taxes for the year in question. It does contend that this assessment was illegal and void. If the Courts have the power to determine what tax would have been legal and require the payment of that amount as a condition of granting relief, the Court below could have given judgment for a sum equal to the proper tax. Aside from the error in giving an instruction precluding the defendant from questioning the valuation of the tangible property (Rec., p. 12), the judgment of the County Circuit Court was in the proper form.

It may be that a Court is justified in enforcing the payment of sums equivalent to a properly levied tax to prevent the avoidance of a tax for that year by the complaining tax-payer. In the same manner that the tax on the franchise was deducted from the sum claimed the tax based on the excessive valuation should likewise have been deducted, and judgment rendered for the legitimate tax.

We conclude, therefore, that since the attempt to collect the tax is by ordinary civil suit the defendant was not obliged to resort to a bill in equity to enjoin the suit a law, because equitable defenses may be pleaded in actions of law under the Missouri Code of Civil Procedure.

III.

The valuation of defendant's poles, wires and instruments at first cost, whereas the testimony proves that through years of actual use such property had depreciated sixty per cent., was in itself gross discrimination; but the valuation of the property of all other persons, companies and corporations at forty per cent. of the actual value of such property in pursuance of a uniform and systematic practice of many years' standing, was discrimination upon discrimination, and amounted to a legal fraud upon this defendant, which entitles it to make the defense and have the relief sought in the present case.

It is a very important question, termed a *dilemma* by Judge TAFT, in a recent, well considered case, whether the constitutional command that taxes shall be uniform overrides the statutory requirement that property be assessed at its true value in money. The question is presented by a tax-payer who, it is admitted or

clearly proved, is discriminated against, and who is subject to a grossly excessive tax compared to the tax upon other property.

The dilemma arises whether the granting of relief does not recognize, and approve the violation of the statute. Citizens A, B and C are assessed and pay taxes upon property assessed at 35 to 40 or 50 per cent. of its true value. Citizen X is assessed and pays taxes upon property assessed at its full value. Every tax-payer should contribute his share of taxes needed by the State and county, but the provision of the State Constitution requiring taxes to be uniform and the provision of the Federal Constitution guaranteeing to every person that his property shall not be taken without due process of law, and securing to every person the equal protection of the law, requires that all property should be taxed in proportion to its value, that the property of A, B and C and X shall be assessed at an uniform valuation.

With the exception of the Supreme Court of Missouri, in its decision in the case at bar, no Court has refused to follow this principle, and but few Courts have hesitated to correct the evil by declaring an assessment invalid, which thus grossly discriminates against the complainant. One case from the Supreme Court of each of the States, Massachusetts, New Jersey and Ohio, has been cited as holding that a complainant whose property has been assessed at a higher proportionate value, but not at a higher valuation than the true market value, cannot ask a Court to compel the board of assessors to assess the complainant's property at less than its true value.

Those who rely upon these cases are careful to state

the propositions in that form, ignoring the fact that the proposition does not involve the precise question in this case. The theory of this defense, as well as the theory of the cases herein referred to, is not that the Court should compel the Board of Equalization to assess the defendant's property at 40 per cent. of its actual value, but rather that assessing and equalizing other property at a valuation less than half the valuation of defendant's property is a legal wrong upon the defendant.

Before considering the long line of cases sustaining the contention of the defendant in this case, it is worth while to examine these three cases and determine just what was decided in each. If the same question was not presented and necessarily decided in these cases, not a single authoritative case can be brought to the support of the truly remarkable holding of the Missouri Court.

The case of *City of Lowell vs. Commissioners of Middlesex County*, 152 Mass., 372; 25 N. E., 469, expressly holds that, in an appeal from the County Commissioner, that body had no right to consider the valuation put upon the property of other persons in proceedings brought by one tax-payer to abate his own taxes, because of over-valuation. It was held that under the statutes of the commonwealth, requiring all property to be assessed at its fair cash value, the cash value alone could be considered in determining whether there had been an over-valuation. The problem for the Court in that case was to reconcile the operations of two statutes. One statute required all property to be assessed at a fair cash valuation. Another statute gave the tax payer the remedy of having his tax abated,

if he was taxed at more than his just proportion. The statute, as quoted, reads:

"A person aggrieved by the taxes assessed upon him may apply to the assessors for an abatement thereof, and if he makes it appear that he is taxed at more than his just proportion, or upon an assessment of any of his property above its fair cash value, they shall make reasonable abatement."

Pub. St. C., 11, Sec. 69.

The meaning of this clause, as construed by the Court, is:

"The just proportion intended by the existing statutes is attained by assessing the property of different persons at a uniform rate, and upon its fair cash valuation."

In the first part of the decision, the Court said:

"A person may be taxed at more than his just proportion either because he is taxed at a disproportionate rate, or for property which he does not own, or because his property is disproportionately valued."

It is to be noticed that no question of the constitutionality of the action of the assessors was raised. The Court simply held that, construing the two statutes together, the Court must deny the taxpayer the remedy for discrimination which would apparently sanction assessing property at less than its cash value.

It may be admitted that this decision on the questions presented is correct. It cannot, however, be seriously argued that the uniformity of taxation which the law of the land, as expressed in the Constitution requires, is to be made subservient to a statute directing that all property is to be taxed at its true value in money. The fallacy lies in assuming that to relieve a taxpayer from this discrimination sanctions a violation of the revenue laws. The theory of the New

Jersey decision (*State vs. State Board of Assessors*, 48 N. J. Law, 1 ; 2 Atl., 789) is that a taxpayer who enjoins or defeats the collection of a tax based upon such a grossly unjust valuation relative to the valuation of other taxable property, is thenceforth entitled to have his property assessed at less than its actual value. Such an assumption is unfounded. Such a result is not necessarily or logically deducible from granting the relief prayed. The Court does not directly or indirectly sanction assessing property at less than its true cash value. It does put the stamp of disapproval upon undervaluation. The decision does not encourage undervaluation of property, for, by compelling uniformity, it makes it easier for the proper authorities to compel the State officers to assess all property at its actual cash valuation.

In the New Jersey case, *supra*, it appeared that the local assessor rated property much below its true value. The State board rated corporate property at its true value. BEASLEY, C. J., said :

> " The local officers disobeyed the injunction of the law, and the contention is that the state officers should have pursued the same forbidden course, and that these acts should now be declared to be abortive because they refused to perpetrate such a malfeasance. Such an argument in our estimation, has no force whatever, and, indeed, it seems a novel suggestion that a court should annul a proceeding because such proceeding conforms to the law."

This part of the opinion appears to be *obiter*, for the case came before the Court on *certiorari*. The opinion, if intended to apply to such a case as the one now before the Court, misconceives both the purpose and effect of the setting aside of the assessment. The purpose is not to annul a law, as was evidently thought by

BEASLEY, C. J., since he follows the above quoted remark with a quotation from Mr. Justice MILLER'S opinion in *Cummings vs. National Bank*, 101 U. S., 156, to the effect that the unfaithful administration of a law will not render the law unconstitutional.

Nor does the complaining taxpayer seek to have the board's action declared abortive because they do not follow their action in other cases, to perpetrate such a malfeasance. The "malfeasance" began when other people's property was assessed at the very low proportion of its true value, but the unlawful discrimination of which the taxpayer complains was completed when he was required to pay taxes upon a valuation very much in excess of the valuation on other property. The taxpayer complains of the consequence of the board's so-called malfeasance, and the Court granting the relief prayed, does not declare the board's conduct abortive in not continuing the malfeasance. The granting of the relief is neither a condemnation nor approval of undervaluation when uniformly practiced; indirectly it condemns the practice.

In *Waggoner vs. Loomis*, 37 O. St., 571, the Supreme Court of Ohio refused to give any relief to a taxpayer whose property was assessed at less than its true value, but about double the value placed on other property in the county. A number of reasons were adduced why the relief should not be granted. It was said that granting the relief would perpetrate a greater wrong upon the taxpayers in "the other eighty-seven counties of the state, where all property, including shares of bank stock, has been assessed according to its true value in money, and upon which the rate required for state purposes has been paid."

However material this circumstance in the case may

be, it does not appear in our case that granting relief to this defendant casts any burden upon any other person. In the Ohio case, however, another circumstance, which may be deemed conclusive, appeared, which does not appear in our case. In that case no fraud, conspiracy, mistake of law or unfaithfulness in the conduct of the officers of the law was charged, and for all that was alleged, the Court could not say but that the difference in valuation was a mistake or error of judgment. It is true McIlvane, J., says in the opinion that even in such cases as *Pelton vs. Bank*, 101 U. S., 143, and *Cummings vs. Bank*, 101 U. S., 153, equity will not afford relief to a complainant who cannot show that the burden imposed on him is greater than it would have been if the laws had been faithfully executed by the taxing of all property by a uniform rule and according to its true value in money. But this remark, if intended as a qualification of *Cummings vs. Bank*, is a *dictum* which the later cases in Federal and State Courts have not followed. The Ohio case does not stand as an authority against the granting of relief to the defendant in this case.

In Illinois the Constitution provides that the General Assembly may tax corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates (Const. 1870, Art 9, Sec. 1). In *Chicago Union Traction Co. vs. State Board of Equalization*, 114 Fed. 557, 563, a case growing out of *People vs. State Board of Equalization*, 191 Ill., 528; 61 N. E., 339, Grosscup, J., held that until the legislative will is thus exercised all the property of the State is to bear uni-

formly the burdens of taxation, and that in calculating the capitalization of such corporations for the purpose of taxation, the standard deliberately adopted by the State Board of assessing all other property throughout the State at seventy-five per cent. of its cash value, could not be disregarded in assessing the property of these corporations.

In an earlier case, reported under the same title, 112 Fed., 607, it was held (*per curiam*) that the attempt to enjoin the State Board of Equalization before it had acted was premature. The case of *The People vs. the State Board of Equalization* (Ill.), 61 N. E., 339, was approved, and this encouragement, which led to the later decisions in 114 Fed., 557, was given:

"If it transpires that the board of equalization, through pique or under the lash and spur of some external power, or through personal fear, or moved by any consideration than the impartial and independent discharge of its own duty, attempts to certify an assessed valuation that in its effect would be a fraud upon any taxpayer, the courts still remain open to the injured taxpayer."

The defendant in the case at bar contends that the enforcement of the judgment of the Supreme Court of Missouri in this case would amount to the taking of private property without due process of law, and also to a denial of the equal protection of the law, a violation of the Fourteenth Amendment of the Constitution of the United States.

Quoting from the opinion of Judge GROSSCUP, in *Chicago Union Traction Co. vs. State Board of Equal-*

ization, supra (p. 565), we state the right for which we now contend:

"Taxes are enforced contributions, levied by the state upon the property of individuals by virtue of its sovereignty, for the support of government, and for the public needs. The money thus taken, until taken, is, as much as real estate and chattels, property within the meaning of the Constitution of the United States; and the taking of such property is a taking of property, as much so, for instance, as the taking of private land for some public work authorized by some law of the State or of Congress.

"Due process of law, as applied to the cases under consideration, is the authorized procedure whereby the property of the individual can be taken by the State; it includes the initial authority to levy taxes; the purpose to which money thus raised is to be devoted; and the instrumentalities that distribute the burden upon the citizens. Ours is a government of laws, and not of individual officers, or of boards or of men.

"Any substantial departure, therefore, in the collection of taxes, from the law, either as authority for a tax, or its purpose, or the provisions for the just distribution of its burdens, is a departure from due process of law; and the enforced collection of taxes, in the laying and distribution of which there is a substantial departure from law, is the depriving of a citizen of his property without due process of law.

* * * * * *

"We have no doubt that complainants may intrench themselves against this invasion by the writ of injunction. One of the primary grounds of equity jurisdiction is to reach cases involving mistake, fraud or coercion, and the relief necessary to their correction. The cases under consideration come clearly within this jurisdiction. It is incomprehensible that the complainants may not avert this threatened invasion of their rights—but they must first yield and then turn prosecutors in a court of law to recover their loss. The fundamental guarantees of the constitution must not be emasculated."

THE GREAT WEIGHT OF AUTHORITY approves the defendant's contention that it should be relieved from this grossly discriminating assessment. From the decisions of the State courts we select the following that

have unequivocally upheld the doctrine of *Cummings vs. National Bank* and *Taylor vs. Louisville and Nashville R. Co.:*

ARKANSAS: *Ex parte Ft. Smith and Van Buren Bridge Co.*, 62 Ark., 461; 36 S. W., 1060.

CALIFORNIA: *Los Angeles Co. vs. Ballerino*, 99 Cal., 597; 32 Pac., 583; 34 Pac., 329. *Pacific Postal Co. vs. Dalton*, 109 Cal., 604; 51 Pac., 1072.

CONNECTICUT: *Randall vs. City of Bridgeport*, 63 Conn., 321; 28 Atl., 523.

ILLINOIS: *Board of Supervisors vs. Railroad Co.*, 44 Ill., 229.

IOWA: *Iowa and Dakota Tel. Co. vs. Schauber*, 91 N. W., 78.

KANSAS: *C. B. & Q. R. Co. vs. Board of Comrs.*, 54 Kan., 786; 39 Pac., 1039.

MICHIGAN: *Merrill vs. Humphrey*, 24 Mich., 170. *Walsh vs. King*, 74 Mich., 350; 41 N. W., 1080.

NEBRASKA: *State ex rel. vs. Savage* (Neb.), 91 N. W., 557.

NEW HAMSPHIRE: *Manufacturing Co. vs. Strafford*, 51 N. H., 455. *Manchester Mills vs. Manchester*, 58 N. H., 38.

NEW YORK: *Mercantile Natl. Bank vs. Mayor, etc., of New York*, 64 N. E., 756.

TENNESSEE: *City of Chattanooga vs. Railroad Co.*, 7 Lea, 563.

WISCONSIN: *Weeks vs. City of Milwaukee*, 10 Wis., 242. *Hersey vs. Supervisors*, 16 Wis., 185. *Lefferts vs. Supervisors*, 21 Wis., 688. *Iron Co. vs. Hubbard*, 29 Wis., 52. *Hersey vs. Board of Supervisors*, 37 Wis., 75.

Cooley on Taxation, 2d ed., pp. 748, 785.

Judson on Taxation, Sec. 478.

Welty on Assessments, Sec. 186.

The Doctrine of this Court and of Other Federal Courts and the Effect of the Fourteenth Amendment as to Discriminating Assessments. Under this Doctrine the Telegraph Company's Defense Ought to Have Been Sustained.

In *Cummings vs. National Bank*, 101 U. S., 153, the officers charged with the valuation of property for taxation in Lucas County, Ohio, where the bank was located, adopted a settled rule or system by which the real and personal property was assessed at *one-third its value and moneyed capital at three-fifths of its value*, and the State Board of Equalization increased the valuation of bank shares to their full value. One-third of the tax the bank paid and then brought suit in the United States Circuit Court to restrain the collection of the remainder. The Court held that the tax was illegal, because the valuation of the property was unequal and in violation of the constitution of the State, which provided for the taxation of all property by a uniform rule, according to its true value in money. Said Mr. Justice MILLER, in giving the opinion of the United States Supreme Court:

"It may be summed up in the statement that the assessors of real property, the assessors of personal property and the auditor of Lucas County, in which is the city of Toledo, concurred in establishing a rule of valuation by which real and personal property, except money, was assessed at one-third of its actual value, and money or invested capital at six-tenths of its value, and that the assessment of the shares of incorporated banks as returned by the State Board of Equalization for taxation to the auditor of Lucas County, was fully equal to the selling prices of said shares and to their true value in money. * * * All this is uncontradicted. The constitutions and statutes of

nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed. * * * *But it is a matter of common observation that in the valuation of real estate this rule is habitually disregarded.* And while it may be true that there has not been in other States such concerted action over a large district of country by the primary assessors in fixing the precise rates of departure from actual values, as is shown in this case, it is believed that the valuation of real estate for purposes of taxation rarely exceeds half of its current salable value. If we look for the reason of this common consent to substitute a custom for a positive rule of the statute, it will probably be found in the difficulty of subjecting personal property and especially invested capital, to the inspection of the assessor and the grasp of the collector. * * * But whatever may be the cause, when it is recognized as the source of manifest injustice to a large class of property around which the constitution of the State has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied so far as the judicial power can give remedy."

One of the earliest cases decided by a Federal Court is *County of South Clara vs. Southern Pac. R. Co.*, one of the six California tax cases reported in 18 Federal Reporter, page 385. The opinion was written by the late Mr. Justice FIELD. The case expresses very clearly the relation of the Fourteenth Amendment to the power of taxation in the State. In the California cases the State Constitution provided that the taxation of property should be in proportion to its value. One of the defenses to the action at law to recover unpaid taxes was that the mode of assessment violated the Fourteenth Amendment to the Constitution of the United States. In that case, as in our own, the State Board of Equalization performed the two functions of equalizing the assessments made by the county boards, and of assessing the franchises and

property of railroads as an original assessing board. Its action in the latter character must also be upon prescribed rules of notice. But though the officers by whom the assessment of these properties is to be made are different, the properties are subject to the same rule of taxation—that is, they are to be fixed in proportion to their value (18 Fed., at 391).

In the California case the tax-payer complained that its property was valued in a manner different from that adopted for other property. It was held that if any element was taken into consideration in one case which was omitted in the valuation of the property of another, the discrimination made against one and in favor of another destroys the uniformity so essential to all just and equal taxation. Our contention is convincingly argued in the language of Mr. Justice FIELD on page 395 :

"The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration in assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value, at a half or a quarter of it, and the property of another at more than its value, at double or treble of it, according to the will or caprice of the State. * * * To levy taxes upon a valuation of property thus made is of the very essence of tyranny and has never been done except by bad government in evil times, exercising arbitrary and despotic power."

* * * * * *

"It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppression, and the cause of more commotions and disturbances in society, of insurrections and revolutions, than any other cause in the world" (p. 399),

* * * * * *

"With the adoption of the [14th] amendment the power of the States to oppress any under any pretense or in any form was forever ended; and henceforth all

persons within their jurisdiction could claim equal protection under the laws."

* * * * * *

"*That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute only his just proportion to the general fund. When such exaction is made without reference to a common ratio, it is not a tax whatever else it may be termed; it is rather a forced contribution, amounting, in fact, to simple confiscation.*"

* * * * * *

"It would, indeed, as counsel in the *San Mateo* case ironically observed, be a charming spectacle to present to the civilized world if the amendment were to be read, as contended it does, in law: Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation;* nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.*"

The host of authorities in accord with the California case, leaves no doubt or question unsettled. In the more recent cases, *Taylor vs. Louisville & N. R. Co.*, 88 Fed., 350, and *Traction Co. vs. State Board of Equalization*, 114 Fed., the United States Court of Appeals has applied the doctrine advanced in Justice SAWYER'S concurring opinion *in the California case to the problem* raised in this case. Justice FIELD, on page 442 of Vol. 18 Federal Reporter, *speaking of the nature of an action at law to recover taxes and of the right to make defense thereto*, said:

"This action is not based upon moral equities, or even upon equities recognized and enforced by courts of equity. It is a dry action at law to recover what is alleged to be a sum of money *legally* due and for which the defendant is *legally*, personally, liable by reason of a valid levy of a tax against it. That is the cause of action alleged and upon that a recovery must be had, if at all, and according to the *allegata* of the complaint. This is not a suit in equity to enforce a lien for a tax. It is not an application for an injunction

against the collection of the tax, in which, possibly, the court might consider whether there were any equities which should call upon it to deny the injunction or relief affirmatively sought. It is not a case for the exercise of discretion. It is an action resting upon a strictly legal personal liability. It is not enough that a valid tax, to some extent, might have been levied. There must be such a tax as throws a legal liability upon the defendant to pay to the plaintiff the sum claimed or there can be no recovery."

It has been frankly admitted by the Missouri Supreme Court that,

" the exemption of the property of an individual or of a private corporation from taxation either in whole or in part, casts an unusual and inequitable burden on the property of those who have not been thus graciously favored."

SHERWOOD, C. J., in *State vs. Hannibal & St. Joseph R. Co.*, 75 Mo., 208, 211.

The provision in the Statute of Missouri empowering the State Board of Equalization to assess the property of telegraph companies in the first instance has been upheld by the Supreme Court of the State and also by the Federal courts.

State ex rel vs. Severance, 55 Mo., 378.

Though the property of one person is assessed by one person, and another kind of property is assessed by another person, the mode of assessment must be the same for both Boards of Assessors. A system of taxation prescribing different modes of taxation for different persons destroys equality and uniformity and denies to the person bearing the greater burden the equal protection of the law.

Railroad Tax Cases, 13 Fed., 722.

County of Santa Clara vs. Southern Pac. R. Co., 18 Fed., 385.

If this is true in the case of two distinct and independent assessing bodies, who intentionally adopt different rules of valuation, **it certainly is true in this case where the board which equalizes assessments made by the local assessors and which consequently has official knowledge of the rule and mode of assessment, also acts as an original assessing board and adopts the different rule that operates so unjustly and disproportionately upon the defendant.**

In the case of *Taylor et al. vs. Louisville & N. R Co.* (60 U. S. App., 166; s. c., 88 Fed. Rep., 350) suit was brought by complainant against State officers to enjoin them from certifying a tax, which they claimed to do by authority of the State. It appears that the State Board of Equalization assessed, for purposes of taxation, the complainant's property at 75 per cent. of its actual value, while on all other property there was placed a valuation of 25 per cent.

Under the constitution of Tennessee it was provided that all property should be taxed according to its value, to be ascertained as the Legislature should direct, so that taxes should be equal and uniform throughout the State, and no one species of property from which a tax may be collected should be taxed higher than any other species of property of the same value. It was held that equity will not enjoin an assessment of property at its full value on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers intentionally and habitually violate the law by

assessing property at less than its true value; but it need not affirmatively appear that they did so with intent to injure complainant and his class of tax-payers.

The opinion by Judge TAFT is a complement to that of MR. Justice FIELD. He said:

"There has been much discussion at the bar upon the point whether the constitution of 1870 requires that all property shall be assessed at its full value, or whether it would satisfy the constitution if the taxing laws required all property to be assessed for taxation at a uniform percentage—say 75 per cent. of its real value. * * * The constitution expressly gives the legislature the power to prescribe that all property shall be assessed at its true value, and the legislature has done so. Such a legislative command is as binding on those whom it affects as if it were in the constitution, because passed in pursuance of the fundamental law; and counsel for complainant do not avoid the difficulty which confronts them in the case—to-wit, that they are seeking to enjoin defendants from doing that which the letter of the law requires the defendant to do, by showing that the requirement is in a constitutionally enacted statute, rather than in the constitution itself.

"The sole and manifest purpose of the constitution was to secure uniformity and equality of burden upon all the property in the State. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species.

"We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. This is a flagrant violation of the clause of the constitution forbidding discrimination in taxation between different species of property. * * * The question presented is, then, whether, when the sole object of an article of the constitution is

being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the constitution and the law for attaining its sole object. We say 'apparent' departure from the constitutional method, because that instrument contemplated a system in which all property should be assessed at its real value. It did not intend that a large part should be assessed at 75 per cent. and a smaller part at 100 per cent. The method of assessing one species of property cannot be truly said to be constitutional, without having regard to that pursued with other species; for the essence of the constitutional requirement is uniformity, and uniformity cannot be affirmed to exist without a due regard to the methods of assessing all species. Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer.

"The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the constitution. To hold otherwise is to make the restrictions of the constitution instruments for defeating the very purposes they were intended to subserve."

After reviewing at length the cases of *Randall vs. Bridgeport* 63 Conn., 321; *Cocheco vs. Strafford*, 51 N. H., 455; *Board of Supervisors vs. Chicago B. & Q. Ry. Co.*, 44 Ill., 229; *Chicago B. & Q. Ry. Co. vs. Board of Commissioners of Atchison Co.*, 54 Kan., 781; *Ex parte Ft. Smith vs. Van Buren Bride Co.*, 62 Ark., 461; and *Cummings vs. National Bank*, 101 U. S., 153, the Court continued:

"The case before us cannot in any material respect be distinguished from the Cummings case. In this

case, as in that, the injunction sought is against the enforment of an assessment upon complainant's property which was made at the true value of the property in accordance with the mandate of the constitution and statute, by assessing officers who had not discriminated against complainant's property by undervaluing other species of property, and who were not themselves guilty of any fraud. In this case, as in that, the unjust operation of the assessment grows out of the systematic and intentional undervaluation of other species of property by assessors who are not responsible for the assessment complained of. In this case, as in that, the effect of the injunction is to compel certain assessors of the State to reduce their assessment to the illegal standard of valuation adopted by different and unfaithful assessors of other species of property, and is justified by the result that in this way is secured something like the uniformity which is the sole purpose of the constitution."

What follows is especially pertinent to the mistaken position taken by the Supreme Court of Missouri in this case (Rec., p. 75) and urged by the counsel for the plaintiff:

"It has been pressed upon us that such preconcert of action by the assessing officers, and no such uniform rule of undervaluation, have been shown in this case as appeared in the Cummings case, and that upon these circumstances the Cummings case turned. We have already found, from the evidence, that there is an intentional undervaluation of property in each county, and that this is uniform as to all real and personal property, and results from a clear understanding between the assessors and county boards of equalization, who have a common motive for the reduction. More than this, it is clearly shown that the state board of assessors and equalizers in 1896, intentionally equalized all real estate in the State at 75 per cent. of its true value for the taxation of the year 1897. Could preconcert be clearer than this?"

[This is equally true in the case now under argument.]

"It is further said that, before the remedy pursued in the Cummings case can become applicable, it must

appear that the undervaluation of one species of property was adopted as a rule of action by the assessors for the fraudulent purpose of discriminating against the complaining taxpayer and his class, and that no such case is presented to this court.

Now, it is true that, before equity will relieve in such a case, it must appear that the assessing officers whose acts of undervaluation create the unjust burden must intentionally and habitually violate the law, by assessing property at a less valuation than that which they know to be its true value; but it is not true that they must be shown affirmatively to intend to injure complainant and his class of taxpayers in so doing. It is true that in the Cummings case the unfaithful assessors, or some of them, did undervalue both real and personal property, and money capital, in which were included bank shares, at different percentages of their true value; but the assessment of which complaint was made was not the work of these assessors at all, but, as here, of a State board of equalization. An intentional undervaluation of a large class of property when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law. In the case at bar the county assessors and board of equilization of each county have been actuated in their violations of the law by the desire to reduce, as far as may be, their county's share of the State burdens. Their undervaluations of property have been uniform as to all property in their county but railroads."

[This is precisely the case as respects telegraph property in Missouri.]

"They could not but know that such undervaluations must work an injustice against the property of railroads, if assessed at its true value by a State board and taxed for county and State purposes on that basis. In this sense, the rule of undervaluations adopted in each county is necessarily 'designed to operate unequally,' within the meaning of Mr. Justice MILLER in the Cummings case. The *ratio decidendi* of that case is to be gathered from the facts and the language of the opinion is to be interpreted in view of the facts. The case has been commented on

by the Supreme Court in a number of subsequent cases, but it has never been modified or overruled."

The Court then considered the following apparent exceptions : *Bank vs. Kimball*, 103 U. S., 732 ; *Supervisers vs. Stanley*, 105 U. S., 305 ; *Stanley vs. Supervisers*, 121 U. S., 550 ; *Bank vs. Perea*, 147 U. S., 87, and, continuing, said :

" We find nothing in these cases which should change our view, already expressed, of the effect of the Cummings case. They merely emphasize the point that equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property ; that such inequalities, due to mistake, to the fallibility of human judgment, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtained ; that, in other words, what may be called ' sporadic cases of discrimination ' cannot be remedied by the chancellor. * * * **If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fraud or intentional discrimination."**

This case was decided by the United States Court of Appeals. *It precisely covers the case at bar.* It seems to have the specific approval of this Court for on *application for a writ of certiorari, the writ was denied by the Supreme Court of the United States (172 U. S., 647).*

This decision seems to leave little room to doubt the application of the doctrine which prevails in the Sixth, Seventh, Eighth and Ninth Circuits to the facts of this

case. In the present case a flagrant intentional discrimination has been made by officers of the State, the same officers who finally determined at what proportion of its true value *all* property in the State shall be assessed.

The whole responsibility for the illegal discrimination rests upon the State Board of Equalization. They had the power and it was their duty to have corrected it.

The uncontradicted testimony of the Secretary of the State, one of the members of the State Board of Equalization for the last eleven yeaas, is that, while property of telegraph companies was assessed at its true cash value, other property in the State was assessed at but 40 per cent. of its true value. The cases hold that it is not necessary that the discrimination be the work of one board of assessors, that the intentional discrimination due to the adoption of different modes of assessment by two boards of assessors is in violation of the uniformity guaranteed by the fourteenth amendment. By much the more is it conclusively shown that the discrimination in this case is the result of the deliberate adoption by the State Board of two different rules of valuation when a member of that board which performs the two functions declares that the **board endorses one rule when equalizing assessments of all property throughout the State, and another when assessing telegraph property as an original assessing board.** The defendant does not complain because, as to it, the revenue law, as to the mode of valuation, is literally enforced, nor would a judgment declaring the tax unjust, illegal and void amount to a judicial sanction of under valuation.

The defendant's defense is not based upon a demand that the revenue law be violated also in its case, but upon the demand that it should not be compelled to bear an unjust proportion of the burden of taxation. It must be remembered that this discrimination is not the result of enforcing the revenue law in one case, but rather the result of not enforcing it in other cases. The defendant's contention is the very opposite of that which BEASLEY, C. J., stated in the New Jersey case.

The discrimination complained of in the case at bar can be described in several ways as occurring in several different ways, according to one's point of view. It is the result of the conduct of the assessors throughout the State, who by concerted unfaithfulness, assess personal property at but 35 or 40 per cent. of its true value, and thus produce the inequality of burdens. Again, this inequality is brought about and consummated and made final and effectual by the Board of Equalization in equalizing the value of property throughout the State at 35 or 40 per cent. of its true value, while defendant's property is assessed at 100 per cent. of its true value. Conversely an inequality is the result of the acts of the board of equalization in assessing the defendant's property at 100 per cent. of its true value, when the local assessors have assessed other property at but 35 or 40 per cent. of its true value, or the board of equalization produces the inequality and discrimination by assessing defendant's property at 100 per cent. after having established the rule of equalizing the assessments upon all other property upon the basis of a 35 or 40 per cent. valuation.

If the acts of the local assessors in having one rule

of valuation while the board of equalization sitting as an assessing board has another, is wrong, certainly the discrimination resulting from the use of two different rules by *the same board*, is an evil which can be remedied. **Such discrimination cannot possibly be the result of an error of judgment.**

An earlier case than the *Taylor case*, decided in the same circuit, is *Trustees Cincinnati Southern Ry. vs. Guenther*, 19 Fed., 395. In that case the question of the unconstitutionality of a tax on railroad property when the valuation of railroad property was higher than the valuation of other property, was raised. KEY, J., said, page 398:

"Mere inequalities in taxation will not vitiate a tax if they be accidental and unintentional. These must occur under any system of assessment, and especially under that in force in this State, in which every civil district and ward has its own assessor. There will of necessity be many instances in which property will be assessed at more than its value, and more, perhaps, in which it will be assessed at less than its value. These errors and discrepancies will not vitiate the tax: they are inevitable. **But a different result follows should a standard of valuation be used for one species of property which is different from that used for another, if the end reached necessarily is the taxation of the one species higher than the other.** The constitution of Tennessee establishes that 'all property shall be taxed according to its value,' that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value (Article 2, Sec. 28). With something of iteration the principle emphasized that taxation shall be equal and uniform. If unjust

discrimination and difference is made, the tax so imposed may be restrained and its collection prevented" (citing *Pelton vs. National Bank*, 101 U. S., 143; *Cummings vs. National Bank*, 101 U. S., 153, and *Chattanooga vs. Railroad Company*, 7 Lea, 563).

Beginning with the *Railroad Tax Cases* the Federal courts have uniformly held to the principles of *Cummings vs. National Bank*, whether the question arose regarding the assessment of railroad shares or national bank shares. Some of the cases decided in the sixth, seventh, eighth and ninth circuits are:

Second National Bank vs. Caldwell, 13 Fed., 429.
Railroad Tax Cases, 13 Fed., 722.
In re Watson, 15 Fed., 511.
California Tax Cases, 18 Fed., 385.
State of Indiana vs. Pullman Palace Car Co., 16 Fed., 193.
Dundee Mortgage Co. vs. School Dist. No. 1, 21 Fed., 151.
Dundee Mortgage Co. vs. School Dist. No. 1, 24 Fed., 197.
Taylor vs. Louisville & Nashville R. Co., 85 Fed., 302.
Taylor vs. Louisville & Nashville R. Co., 88 Fed., 350.
Chicago Union Traction Co. vs. State Board of Equalization, 114 Fed., 557.

The case of *Ward vs. Board of Equalization*, 135 Mo., 322, 323, expressly admits the soundness of the doctrine of *Taylor et al, vs. Louisville & Nashville R. Co., supra*, but denies the application to that particular case. In that case the plaintiff complained of the law under which the board of equalization of a county acted. The case came before the Circuit Court of the

county on a writ of *certiorari*. Under the rule established by *Railroad Co. vs. State*, 64 Mo., 294, the question of abuse of authority by the board was not, and could not have been raised. The case stands for no more than this, that a law is not to be adjudged unconstitutional because officials acting under it *may* abuse the discretion vested in them.

The Supreme Court of Illinois has recently held that an assessment may be impeached because the property has been assessed too high (*State Board of Equalization vs. People*, 191 Ill., 528, 61 N. E., 339). In this case the assessment was set aside as void. HAND, J., said:

"While it is true that fraud will not be presumed and that the decision of the state board of equalization in fixing the value of corporate property for the purpose of taxation is quasi-judicial in its nature, still when it is apparent to the court that every well known rule for the valuation of capital stock, including franchises, has been violated and arbitrarily disregarded by the board, and such board has refused to consider the statements as to values prepared by the assessors, under the statute for its use, and has refused to consider information as to the value of such corporate property submitted to it by interested parties, and has arbitrarily fixed such assessments at a grossly inadequate sum *under the rules passed by it for the occasion*, the court is justified in holding that fraud in the making of such assessments has been established and such pretended assessments may be properly disregarded and treated as no assessments, and such boards may be coerced by the writ of mandamus to assess such property."

The action of the board can always be impeached upon the ground of fraud and discrimination, by the taxpayer.

Hotel Co. vs. Liebe, 33 Ill., 602.
Railroad Co. vs. Cole, 75 Ill., 591.

"It was held in *State Board of Equalization vs. People, supra*, that, "The State Board of Equalization has power to pass such rules for ascertaining the fair cash value of the stock of corporations, including franchises, as it may deem equitable and just, *provided such rules are not inconsistent with the constitution or the revenue act*" (61 N. E. 346. The italics are our own).

In that case the State Board formally adopted a new rule for the ascertainment of the cash value of the capital stock of certain corparations. In this case practically the same thing was done. A rule was adopted which discriminated between telegraph companies and other persons so that either the assessment of the telegraph company, or that of the ordinary individual, was absolutely unconstitutional and void, because in violation of the provisions requiring *all property subject to taxation to be taxed in proportion to its value* (Art. 10, Sec. 3 of the Const. of Mo).

The doctrine of *State Board of Equalization vs. People, supra*, and *State ex rel. vs. Cunningham*, 153 Mo., 502, makes the answers of the defendant in this case a complete defense. It is established beyond the least doubt that property generally is assessed at about forty per cent. of its actual value. According to the testimony of ALEXANDER A. LESUEUR, Secretary of State for eleven years previous to the taking of his deposition, it is the rule of the board to assess property at about forty per cent. of its actual value, generally, but that in St. Louis the property is assessed at fifty per cent. of its value (Rec., p. 23).

The presumption is that the property of the Western Union Telegraph Company was assessed at its full cash value, and such presumption is borne out by the

testimony of the members of the Board of Equalization. MR. LESUER, Secretary of State, testified that

" the assessment would have to stand upon the language used by the board itself, which language taken from the report of the board, the witness made his own. According to this report, the board received evidence concerning and considered, the value of the cost of construction of said telegraph line and the market value and par value of the stocks and bonds and of the gross receipts and net earning power and the franchise and value thereof * * * in arriving at actual cash value of said telegraph company " (Rec., p. 19).

This same witness testified that during the past five years, the real and personal property throughout the State had been assessed at the average valuation of about forty per cent. (Rec., p. 23). The certified copy of the record of the proceedings of the Board of Equalization was admitted as evidence, and the members of the board adhered to this report throughout as their testimony. This report states unequivocally that the board, after considering certain things which " would assist in its findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company," assessed and valued the said property at $1,827,727.45. The gross discrimination is admitted by the report and testimony of the members of the board. In addition MR. COOK testified, and his uncontradicted testimony (giving specific data), demonstrated that the property was assessed at more than its actual cash value. In short, the uncontradicted evidence is that the property of the plaintiff in error was *intentionally* assessed at at least one hundred per cent. of its value. And the property of all others was *intentionally* assessed, and that as-

sessment *intentionally* approved by the State Board at 40 per cent. of its true value (Rec., p. 71).

MARSHALL, J., in the opinion says of their testimony:

"It has only been shown by the testimony of one member of the State board of equalization that, in his judgment, the valuation put upon property generally is only 35 or 40 per cent. of its true value. The law contemplates that for purposes of taxation property shall be assessed at its true value in money (Rev. St., 1899, Sec. 9180), and it also presumes that all officers do their duty. * * * The evidence adduced is not sufficient to overthrow this presumption, nor to establish a combination or unlawful course of conduct. It is only enough to show what the witness believed to be the value of the property, but not enough to convict the local assessor of intentional or systematic violation of duty."

The learned Judge certainly forgot that the witness was a member of the Board of Equalization, which, under the Missouri statutes, performs the two functions of equalizing assessments made by the County Courts, and *assessing originally railroads*, telegraph, telephone, bridge and express companies, and that *he spoke of his own knowledge, not of his opinion, concerning the assessed value of ordinary property.* What could be more conclusive than the admission, the uncontradicted admission of a member of this board, that the property of the defendant was assessed at a 60 per cent. higher value than ordinary property?

The other objection mentioned in the opinion, that this defendant shows but one isolated instance of discrimination, does not deserve consideration; for the record shows that this discrimination extended to $971,326.89 of tangible property and $856,400.56 of "all other property" which is deemed the "franchise

valuation" by the then Secretary of State. If this defendant were the owner of *all* property used in conducting a telegraph business in this State the learned Judge would be obliged to make the same objection, if he deems it a substantial one.

The objection that one cannot complain because his property is assessed at its full market value, while other propety is assessed at 35, or 40 or 50 per cent. of its actual value, is most hesitatingly made in the one sentence :

" The law contemplates that, for purposes of taxation, property shall be assessed at its true value in money ; * * * and it also presumes that all officers do their duty " (Rec., p. 71).

In none of the cases of discrimination and fraud is this considered a substantial objection. As was said by TAFT, J., in *Taylor et al. vs. Louisville & N. R. Co.*, 88 Fed., 350 :

" The court is placed in a dilemma from which it can only escape by taking that path which, while it involves a nominal departure from the law, does injury to no one, and secures that uniformity of tax burden *which was the sole end of the constitution.*"

In the recent case of *State ex rel. vs. Savage et al.* (Neb.), 91 N. W., 716, HOLCOMB, J., said :

" The object of the law of uniformity is accomplished if all property within the taxing jurisdiction is assessed at a uniform standard of value, as compared with its actual market value, even though there be a great disparity between values as assessed for taxes and the value as fixed in the open markets by barter, exchanges or by buying and selling, and other commercial transactions in which values and prices enter as important factors. * * * Thus, if the property of one citizen is valued for taxation at one-fourth its value, others within the taxing district have the right to demand that their property be assessed on the same basis."

In accord :

Bureau Co. vs. Chicago B. & G. C. Co., 44 Ill., 229.

As was said by the late Chief-Justice Doe in the case of *Cochico Co. vs. Strafford*, 51 N. H., 455, 482 :

" The common practice of undervaluing real estate for the purposes of taxation, may have led the legislature to employ an unusual number of synonymous words, not to convey their meaning, but to impress it upon selectmen. Whatever the object of the tautology, it does not modify the legal or the natural interpretation of the word 'appraise.' If the legislature had said, 'the selectmen shall appraise all taxable property, and stopped there, it would be the duty of the selectmen to appraise all taxable property at what it is worth ; and that duty is emphasized, not changed by the other words of the statute" (* * **full and true value in money*).

" The statute provides that when a taxpayer properly applies by petition for an abatement of a tax, the court shall make such order thereon as justice requires (Gen. Stats., Ch. 53, Sec. 11). Justice requires an equal rate of taxation of Strafford real estate. **If the Strafford real estate and others was appraised, in 1870, at a less rate than its full value, the real estate of the plaintiffs should be appraised by the commissioners at the same rate, so that the plaintiff shall pay their proportion of tax and no more. The usual rate in farming is well understood, and the practice of undervaluation is so universal as to raise a presumption of fact that it prevails in Strafford.** When the commissioners have ascertained the fact of the full value of the plaintiff's Strafford real estate, on the first day of April, 1870, they should proceed further, and appraise it at its value compared with the value at which other Strafford real estate was appraised by the selectmen in 1870. This comparative value is the only question which the commissioners are appointed to decide, and is a pure question of fact."

The opinion was approved in the later case (*Mills vs. Manchester*, 58 N. H., 38).

In the answer of the defendant (Rec., pp. 8–10) it is specifically charged that the personal property of defendant was intentionally and fraudulently assessed at a higher valuation than other personal property of the same class in the State, and the testimony established beyond question that the defendant was assessed in utter disregard of any attempt to secure uniformity. The initial error was made by the trial court in giving the plaintiffs' instruction numbered 2, thus barring out any inquiry into the fraudulent and arbitrary action of the board (Rec., p. 55). The error was aggravated by the Supreme Court of the State in affirming the judgment of the trial Court after declaring that the evidence was insufficient to bring the case within the well-recognized rule. It was also error to base the denial of the right to question the board's decisions on the ground that the defendant had not formally tendered or offered to tender into court any specific sum deemed to be due. If that were true, there was no occasion for the Court to pass upon the constitutionality of the franchise tax, or upon the proof necessary to prove an unlawful descrimination. Apart from that criticism of the Court's error, the nature of the suit and the character of questions involved precluded a formal tender of any sum, especially when in this kind of a suit judgment could be rendered for the sum legally due, if any.

If the taxpayer had taken the initiative by a bill in equity to prevent the collection of the tax, it might have been urged, as a just condition, that it offer to pay what was clearly due, because in any decree no

judgment for the sum could be given. In this case the State took the initiative. The action is such that it could not fail to recover what was justly due under a legal assessment. This appears to be recognized in one part of the opinion of the Supreme Court, for in reversing the judgment of the trial Court wherein the claims of the plaintiff were cut down from $1,027.22 to $605.82 the reversal is not put upon the ground that defendant could not attack the judgment of the Board of Equalization without first tendering the sum thought to be actually due, but upon the purely legal ground that the tax was legal and constitutional. This very inconsistency shows that the objection to defendant being heard to question the board's judgment must be more substantial than the practice in equity proceedings, where conditions may rightfully be imposed to avoid multiplicity of action. In a suit at law, the defendants' contention requires neither the judicial approval of under valuation in assessing property nor depriving the State of the amount of taxes legally due.

IV.

With but few exceptions, the Supreme Courts of all the States in which the question has arisen have upheld the constitutional guarantee of equality and uniformity rather than make a few individuals or corporations bear the burden of what Mr. Chief-Justice Beasley termed the assessor's malfeasance.

Judson, in his late excellent work on taxation, made this deduction from the recent decisions of Judge

TAFT and Judge GROSSCUP (the last sentence is italicised to call to mind the contention that the defendant's complaint is of an isolated case):

"It follows, therefore, that, where there is habitual and intentional discrimination in the valuation of property, resulting in substantial inequality of taxation, there is a denial of the equal protection of the laws. The discrimination must not be sporadic or occasional, but substantial—that is, relative undervaluation must extend to a large class of individuals or corporations, and not solely to one individual or corporation. *It is immaterial, however, that the discrimination is aimed only against one individual or class, as the equal protection of the laws requires that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons and other classes in the same place and under like circumstances.*"

Judson on Taxation, Sec. 478.

It cannot be denied that the testimony showed the discrimination to have been not merely a sporadic or occasional occurrence, but rather the settled policy of the board for years past.

In the opinion of the Missouri Supreme Court it is said that the defendant "has only shown by the testimony of one member of the state board of equalization that, in his judgment, the valuation put upon property generally is only 35 or 40 per cent. of its true value,' and that "the law contemplates that, for purposes of taxation, property shall be assessed at its true value in money." The Court likens the case to one where a stranger states that, in his opinion, one man's property is assessed at 40 per cent. of its true value, while another's property is assessed at its full value. *Such is not this case.* By statute the one Board of Equalization performs two functions. It would be straining the formalism of our law to insist that a member of this board could not in

the one examination testify as to what he knows officially in both capacities. There is no better evidence of the proportion of its true value at which ordinary property is assessed than the testimony of the oldest member in point of service, of the Board of Equalization. The Court would convey the impression that the witness was testifying as to the conduct of the local assessors alone or that he had deliberately falsified.

Case Summarized.

We have, then, concerted action upon the part of State officers acting under State laws which authorize an assessment, in which the defendant is intentionally and unjustly discriminated against. We have the case of a state law so administered that the property of the defendant is taken in violation of the constitutional guarantee of equal protection of the law. We have the case of the State by its duly authorized officers attempting to enforce this unjust burden upon the defendant in a suit at law. We have the case of officers of the State willfully and intentionally departing from the rule adopted for the valuation of the great mass of personal property in the State, in consequence of which this defendant bears a greater burden than his neighbor. It is submitted that no stronger case can be found for the application of the well established rule:

> A public officer who is empowered by law to apportion certain burdens among the citizens of a State as in his judgment shall be just, must perform that task by the exercise of his best discretion. If he is actuated by a fraudulent purpose and instead of obeying the law, disregards its man-

> date, declines to bring his judgment to bear upon the question submitted to him, and arbitrarily, and with express reference to defeating the ends to which the law aims, determines to impose an excessive burden upon a particular citizen, he thus commits a wrong which is subject to the law's correction.
>
> Opinion of COOLEY, J., in *Merrill vs. Humphrey*, 24 Mich., 170.

The fact that the law permits an officer such latitude that he may exercise his discretion in an arbitrary and capricious manner does not make the law unconstitutional, but the acts of the officer are in violation, if not of the law itself, of the constitutional guarantee that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The arbitrary and intentional departure from the accustomed mode of assessing personal property by the Board of Equalization was an act of the State which, if permitted by the Court, will amount to a taking of property in violation of the highest law of the State; it will amount to a more serious violation of the constitutional guarantee of the equal protection of the laws. The judgment of the Supreme Court of the State in sustaining the effort of the State to collect a discriminating tax is itself an act of the State in violation of the fourteenth amendment.

We submit that the judgment of the Supreme Court of Missouri ought to be reversed.

ELENEIOUS SMITH,
ALEXANDER NEW,
For Plaintiff in Error.

JOHN F. DILLON,
HENRY D. ESTABROOK,
Of Counsel.

APPENDIX.

State and Federal Statutes Involved in this Case.

ACT OF CONGRESS.

United States Telegraph Act of July 24, 1866.

(Stats. at Large, Vol. 14, p. 221).

"AN ACT to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, being *Title LXV.* of the U. S. Rev. Stat (p. 1019).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Sec. 1. That any telegraph company now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by an Act of Congress, and over, under or across the navigable streams or waters of the United States, provided that such lines of telegraph shall be so constructed and maintained as not to

obstruct the navigation of such streams and waters and interfere with the ordinary travel of such military or post-roads.

And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses, in the construction, maintenance and operation of said lines of telegraph and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its lines of telegraph may be located, as may be necessary for its stations, not exceeding 40 acres for each station; but such stations shall not be within 15 miles of each other.

"SEC. 2. And be it further enacted that telegraphic communications between the several departments of the Government of the United States and their officers and agents, shall, in their transmission over the lines of any of said companies, have priority over all other business and shall be sent at rates to be annually fixed by the Postmaster-General.

"SEC. 3. And be it further enacted that the rights and privileges hereby granted shall not be transferred by any company acting under this Act, to any other corporation, association or person; provided, however, that the United States may at any time after the expiration of five years from the date of the passage of this Act for postal, military or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies, at an appraised value to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"SEC. 4. And be it further enacted that before any telegraph company shall exercise any of the powers or privileges conferred by this Act such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by this Act."

Missouri Statutes.

"SEC. 9387. BRIDGES AND TELEGRAPH AND EXPRESS FRANCHISES TAXABLE—DUTIES OF COUNTY COURTS AND BOARDS OF EQUALIZATION.—All bridges over streams dividing this state from any other state, owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and personal, including the franchises owned by telegraph and express companies, which shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts and the county and state boards of equalization are hereby required to perform the same duties and are given the same power in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have, or may hereafter be empowered with, in assessing, equalizing and adjusting the taxes on railroad property; and the president or other chief officer of any such bridge, telegraph or express company, or the owner of any such toll bridge is hereby required to render statements of the property of such bridge, telegraph or express company in like manner as the president or other chief officer of the railroad company is now, or may hereafter be, required to render for the taxation of railroad property" (Rev. St. of Missouri, 1899), Vol. 2, Chap. 149, Art. IX., p. 2181).

Section 9360.

"SEC. 9360. LOCAL PROPERTY, HOW ASSESSED.—All property, real, personal or mixed, including lands, machine and work shops, round-houses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this state not hereinbefore specified, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this article." (Rev. St. of Missouri, 1899, Vol. 2, Chap. 149, Art. VIII., p. 2174).

Section 9180.

"SEC. 9180. VALUATION TO BE PLACED ON PROPERTY AND ORDER OF ARRANGEMENT.—The assessor shall value and assess all the property on the assessor's books according to its true value in money at the time of the assessment; and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation. Each tract of land and town lot shall be assessed and valued separately; but all land in a section and lots in a square or block, owned by one person, which are contiguous, or which can be consolidated into one tract, lot or call, shall be valued as one tract, lot or call, as contemplated in section 9168. Each kind of property shall be assessed separately from every other, except: First, the number of horses and their valuation; second, the number of mules and asses and their valuation; third, the number of cattle and their valuation; fourth, the

number of sheep and their valuation; fifth, the number of hogs and their valuation; sixth, all moneys, notes, bonds and other credits, in a separate column; but clocks, watches, carriages and household furniture, and other personal property, shall be entered in one column under the head of 'other personal property'" (R. S. of Missouri, 1899, Vol. 2, Chap. 149, Art. II., p. 2130).

Section 9127.

"SEC. 9127. DUTY OF STATE AUDITOR—PROPERTY, HOW EQUALIZED. The state auditor shall lay before the board of equalization the abstracts of all the taxable property in the state and the abstracts of the sales of real estate in such counties as returned to him by the respective county clerks and the president of the board of assessors of the city of St. Louis, and the board shall classify all real estate situate in cities, towns and villages as town lots and all other real estate as farming lands, and shall classify all personal property as follows: First, banking corporations; second, railroad corporations; third, street railway corporations; fourth, all other corporations; fifth, bonds, notes and evidences of indebtedness; sixth, horses, mares and geldings; seventh, mules; eighth, asses and jennets; ninth, neat cattle; tenth, sheep; eleventh, swine; twelfth, farm implements and all other personal property. And the board shall proceed to equalize the valuation of each class thereof among the respective counties of the state in the following manner:

"FIRST—It shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money such per centum as will increase the same in each case to its true value.

"SECOND—It shall deduct from the valuation of each class of the property, real or personal, of each county which it believes to be valued above its real value in money such per centum as will reduce the same in each

case to its true value." (R. S. Missouri, 1899, Vol 2, Chap. 149, Art. I., p. 2116).

Section 9228.

" SEC. 9228. SEIZURE AND SALE OF PROPERTY AFTER OCTOBER 1ST.—The collectors shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property: Provided, that no such seizure or sale for taxes shall be made until after the first day of October of each year, and the collector shall not receive a credit for delinquent taxes until he shall have made affidavit that he has been unable to find any personal property out of which to make the taxes in each case so returned delinquent; but no such seizure and sale of goods shall be made until the collector has made demand for the payment of the tax, either in person or by deputy, to the party liable to pay the same, or by leaving a written or printed notice at his place of abode for that purpose, with some member of the family over fifteen years of age. Such seizure may be made at any time after the first day of October, and before said taxes become delinquent, or after they become delinquent; provided further, that when any person owing personal tax removes from one county in this state to another, it shall be the duty of the county collector (or township collector as the case may be) of the county from which such person shall move, to send a tax-bill to the sheriff of the county into which such person may be found, and on receipt of the same by said sheriff, it shall be his duty to proceed to collect said tax-bill in like manner as provided by law for the collection of personal tax, for which he shall be allowed

the same compensation as provided by law in the collection of executions. It shall be the duty of the sheriff in such case to make due return to the collector of the county from whence said tax-bill was issued, with the money collected thereon." (R. S. of Missouri, 1899, Vol. 2, Chap. 149, Art. III., p. 2140).

Section 9197.

"SEC. 9197. COUNTY COURT TO REMEDY ERRONEOUS ASSESSMENTS. The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes; and where any lot of land or any portion thereof has been erroneously assessed twice for the same year, the county court shall have the power, and it is hereby made its duty, to release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section" (Rev. St., 1889, Sec. 7579; R. S. Missouri, 1899, Vol. 2, Chap. 149, Art. II., p. 2134).

Laws of Missouri, 1865.

Section 5, Chapter 65, entitled "Of Telegraph Companies," Laws of Missouri 1865: "Companies organized under the provisions of this chapter, for the purpose of constructing and maintaining magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this state in such manner as not to incommode the public in the use of such roads, streets and waters." (Laws of 1865, p. 349).

"*Be it enacted by the General Assembly of the State of Missouri, as follows:*

"SECTION 1. The franchises (other than the right to be a corporation) of all railroad, street railroad, bridge, telegraph, telephone, conduit, water, electric light and gas companies, and of all other similar corporations owning, operating and managing public utilities, and of all *quasi* public corporations possessing special and peculiar privileges and authorized by law to perform any public service (except corporations formed for religious, educational and benevolent purposes) shall be assessed for the purposes of taxation at the same time and in the same manner as other property of such corporation is now or may hereafter be required to be assessed; and there shall be levied upon the assessed value of such franchise the same rate of taxation as may be levied upon other property of such corporation. Said tax shall be due and payable, and like proceedings may be had to collect the same, and when collected it shall be disposed of in the same way as the taxes imposed upon the other property of such corporation.

"SEC. 2. The state board of equalization in cases of railroads, street railroads, bridges, telegraph, telephone companies and all other corporations whose property the state board of equalization is now or may hereafter be required to assess, and the county assessor, in case of the other *quasi* public corporations referred to in the preceding section, shall ascertain, fix and determine the total value for taxable purposes of the entire property of such corporation, tangible and intangible in this state, and shall then assess the tangible property and deduct the amount of such assessment from the total valuation and enter the remainder upon the assessment list or in the assessor's books, under the head of 'all other property.'

"SEC. 3. There being no statute now in force expressly directing the assessment and taxation of the franchises of the corporations specified in this act, an emergency exists, and this act shall take effect and be in force from and after its passage.

"Approved March 9, 1901." (Laws of 1901, p. 232).

FILE COPY.

IN THE

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
APR 13 1903
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1902.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

STATE OF MISSOURI, ex rel., GOTTLIEB,
Collector,
Defendant in Error.

No. 256.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

HUNTER M. MERIWETHER,
Attorney for Defendant in Error.

ROBT. E. BALL,
Of Counsel.

HORN & COMPANY,
Shukert Building, Kansas City, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

STATE OF MISSOURI, ex rel., GOTTLIEB, Collector,
Defendant in Error.

No. 256.

STATEMENT.

This is a suit against the Western Union Telegraph Company for the collection of its taxes for the year 1899. The statutes under which said taxes were assessed are as follows:

"Sec. 9180. The assessor shall value and assess all the property on the assessor's books, according to its true value in money at the time of the assessment, and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation."

"Sec. 9123. The term 'property' wherever used in this Chapter, shall be held to mean and include every tangible or intangible thing, being the subject of ownership, whether animate or inanimate, real or personal."

"No. 9387. All bridges over streams dividing this state from any other state . . . . . and all property, real or personal, including the franchise owned by the telegraph and express companies, shall be subject to taxation for state, county, municipal and other local purposes, to the same extent as the property of private

persons, and the taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state board of equalization are hereby required to perform the same duties and are given the same power in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts or boards of equalization have, or may hereafter be empowered with, in assessing and adjusting the taxes on railroad property."

The assessment of railroad and telegraph property is made by a state board. This state board is composed of the governor secretary of state, state auditor, state treasurer, and attorney general. The board has power to summon witnesses by process issued to any officer authorized to serve subpoenaes, and has the power of the circuit court to compell the attendance of witnesses, and to compell them to testify. It has the power, on their knowledge, or such information as they may obtain, to increase or reduce the aggregate value of the property of any telegraph company, included in the statements made to them, or by the returns of the clerks of the county courts, and are required to assess, adjust and equalize any other property belonging to the telegraph company in this state, upon which no returns have been made, and which may be otherwise known to them, as they may deem just and right. In making up the assessment of any such property the board may arrive at its findings, conclusion and judgment upon its knowledge or such information as it may have before it, and shall not be governed in its findings, conclusions and judgments by the testimony which may be adduced, further than to give it such weight as the board may think it is entitled to. See Sec. 9344 Revised Statutes of Missouri.

The assessment was made by the state board under, and pursuant of these sections, the resolution of the state board being as follows:

"State of Missouri, office of state auditor.

Be it remembered that heretofore, to-wit., on the twenty-fifth day of July, 1899, the following, among other proceedings, were had by the state board of equalization, viz:

The state board of equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company, through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidence of value, and all matters bearing upon the question of the value of the property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and the gross receipts and net earning power, and the franchise and value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its findings, conclusions, and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the state board of equalization assesses and values for taxes of 1899, the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the state board of equalization that the assessed value thereof be distributed upon the classes of property as follows:

6,075.98 miles of poles at $71.50 per mile	$434,432.57
23,767.34 miles of wire at $22.02 per mile	523,356.82
3,375 instruments at $5.70 each	13,537.50
All other property at	856,400.56
	$1,827,727.45."

The trial court decided in favor of the taxes assessed against the valuation of the poles, wires and instruments of the telegraph company, but found against the taxes on all other property, because said trial court found that this valuation included the value of the intangible or franchise property of the telegraph company, and in the opinion of the trial court, this was not taxable by the State of Missouri. Both parties appealed to the Supreme Court of Missouri, where the whole case was elaborately briefed and argued by both sides. The Supreme Court of Missouri, by a unanimous opinion, found in favor of

the taxes upon all of the property, including that assessed against the intangible property of the telegraph company. The opinion of the Supreme Court of Missouri is set forth in full on page 67 of the transcript of the record. The same points were urged by the telegraph company before the Supreme Court of Missouri that are presented here. These points were fully considered and decided by the Missouri Court, and, as many of the questions in this case are dependent on the construction of the statutes and laws of the State of Missouri, the opinion of its highest court should be of very great weight with this court in ruling upon the petition of the plaintiff in error.

The contentions of the telegraph company, briefly stated, are: First, that it was discriminated against in that its property was assessed at a higher rate than other property throughout the state; and second, that its franchises or intangible property, are non-taxable. But it will be observed from the examination of the record in the case at bar that the two points are practically one. In other words, they are dependent upon each other. It is not contended by the telegraph company that its property is valued too high, or that it is discriminated against, if the state board had authority to take into consideration the value of the property as a telegraph line. In other words, there is not a syllable of evidence introduced by the telegraph company as to the value of its property in the form in which it is used. It contends that it is not taxable in this form, but that it must be taxed only as so many disconnected poles and pounds of wire and so many instruments. If the contention of the telegraph company upon this point is the law; that is to say, if the State of Missouri is not permitted to tax the company as a telegraph company, but is compelled to tax it simply as owning so many disconnected pieces of personal property consisting of poles, wires and instruments, then it is probably true that this property was valued higher than the average value placed upon other property throughout the state. But even in this case, the plaintiff in error must fail in its contention for the reason that it has not adopted the proper method to review the assessment

made by the state board. The defendant in error will contend that the Western Union Telegraph Company is taxable in Missouri upon all of its property, tangible and intangible, and if we are right in this question there is nothing else which the court need consider.

POINTS AND AUTHORITIES.

I.

The franchises, in the sense of intangible property, as well as the poles and wires of the Western Union Telegraph Company, are taxible by the several states. Such franchise taxes have been sustained in all recent cases by the Supreme Court of the United States against this defendant, and others similarily situated.

Western Union Tel. Co. vs. Massachusetts, 125 U. S., 530.
Massachusetts vs. Western Union Tel. Co., 141 U. S., 1-40.
Central Pacific Ry. Co. vs. California, 162 U. S., 91.
Western Union Tel. Co. vs. Norman, 77 Fed. Rep., 13.
Western Union Tel. Co. vs. Taggart, 162 U. S., 1.
American & English Ency. of Law, Vol. 25, page 873.
Adams Express Co. vs. Ohio, 166 U. S., loc. cit., 220.
Commonwealth vs. Western Union Tel. Co., 2 Dauph. (Pa.), 40.
Michigan Tel. Co. vs. City of Charlotte, 93 Fed. Rep., 11.
Keokuk & H. Bridge Co. vs. Kentucky, 175 U. S., 626.
Henderson Bridge Co. vs. Kentucky, 166 U. S., 154.
Louisville Tobacco Warehouse Co. vs. Commonwealth, 49 S. W., 1069.
Commonwealth vs. Manor Gas Co., 188 Pa. St., 195.
Wier vs. Norman, 166 U. S., 171.

II.

The assessment made by the state board was an assessment of the property of plaintiff in error, and did not include or in any way affect the right to exist and transact its business in Missouri or elsewhere. The tax is strictly a property tax, and having been

fairly and legally assessed upon a reasonable valuation of the property, should be sustained.

National Bank vs. Commonwealth, 9 Wall., 353.
Railroad Co. vs. Pemiston, 18 Wall., 5, loc. cit. 30.
Commercial Electric Light Co. vs. Judson, 56 Pac. Rep. (Wash.), 829.
Louisville, Ry. Co. vs. Commonwealth, 49 S. W., 486.
Paducah St. Ry. Co. vs. McCracken, 49 S. W., 178.
Owensboro National Bank vs. City of Owensboro, 173 U. S., 664.
Commonwealth vs. Manor Gas Co., 2 Dauph. (Pa.), 128.
People of New York vs. Roberts, 19 Sup. Ct. Rep., 58.

III.

There is a clear distinction between a license tax and a property tax. The former involves a charge for permission or authority to transact certain business, while the latter is a contribution imposed upon, and measured by the property of an individual or corporation. The state cannot impose a license, impost, or embargo on plaintiff in error, even though it be called a tax. But it can take from the property owned by plaintiff in error within the jurisdiction of the state, a sufficient amount to pay its just proportion of its governmental expenses. Nothing else having been attempted the tax should be sustained.

Cooley on Taxation, 2nd Ed. p. 383, p. 576.
Burroughs on Taxation, Sec. 77, p. 146, Sec. 85, p. 169.
Judson on Taxation, p. 130.
Welton vs. Missouri, 91 U. S., 275.
State vs. Emment, 103 Mo., 241.
Emment vs. Missouri, 156 U. S., 296.

IV.

The action of the state board in valuing and assessing the property of the plaintiff in error is not subject to review or attack in this proceeding.

Cooley on Taxation, 2nd Ed., page 748.

Burroughs on Taxation, page 238.
Hamilton vs. Rosenblat, 8 Mo. App., 237.
Yazoo & M. V. R. R. Co. vs. Adams, 25 So. Rep., 355.
Home Ins. Co. vs. Lynch, 56 Pac. Rep., 681.
Danforth vs. Livingston, 23 Mont., 558.
City of Elizabeth vs. New Jersey Jockey Club, 44 N. J. App., 207.
Dayton vs. Multnomah, 55 Pac. Rep., 23 (Or.).
Ledoux vs. Le Bee, 83 Fed. Rep., 761.
McLeod vs. Receiver, 71 Fed. Rep., 455, 18 C. C. A., 188.
Brooklyn R. R. Co. vs. City, 38 N. Y. S., 154.
State ex rel. vs. Springer, 134 Mo., 212.

ARGUMENTS AND QUOTATIONS FROM THE AUTHORITIES.

We admit that the record of the board shows that in arriving at the value of the property of the plaintiff in error the state board did, among other things, consider what is therein termed the "franchise owned by said company and the value thereof." We contend, however, that the assessment is an assessment against the property of the company, as distinguished from an assessment against its right to exist, and this distinction is well recognized in considering similar cases against this same company, as will be seen by the cases hereinafter cited.

The assessment in this case in all respects is similar to the assessment made against the same company by the State of Massachusetts. The leading case is entitled *"Western Union Telegraph Co. vs. Massachusetts,* 125 U. S., 530." The answer of the company in that case is almost the same as in the case at bar. It is set out fully in the opinion of the court. The company maintained that the franchise was exempt from taxation by reason of the United States statute set out in the case at bar; and also that it held no franchise from the State of Massachusetts and, therefore, a tax based upon a consideration of its franchise value must be invalid. The opinion was by Mr. Justice MILLER, who, after an exhaustive consideration of the facts, states the law as follows (loc. cit. 547):

> "The argument is very much pressed, that this is a tax upon the franchise of the company, which franchise, being derived from the United States by virtue of the statute above recited, cannot be taxed by a state, and council for appellant occasionally speaks of the tax authorized by the law of Massachusetts upon this, as well as other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchise. But by whatever name it may be called, as described in the laws of Massachusetts, it is esentially an excise upon the

capital of the corporation. The laws of the commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. The telegraph company, which is defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, the right to sue and be sued, and to exercise the business of telegraphing to the laws of the state under which it is organized, but the privilege of running the lines of its wires through and over any portion of the public domain of the United States, over and along any of the military and post roads, etc., is granted to it by act of Congress. This, however, is a mere permissive statute and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or established by the federal government, carries with it any exemption from the ordinary burdens of taxation. While the state cannot interfere for any specific reason to prevent the corporation from placing its lines along these post roads, nevertheless, the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real and personal property the same as any other person would be. It could never have been intended by the Congress of the United States in conferring upon a corporation of one state the authority to enter the territory of another state and erect its poles and wires therein to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

It will be observed, as set forth in the opinion and the notes thereunder, that the statute of Massachusetts requires every telegraph company owning a line of wires within the state to pay to the state treasurer "a tax upon its corporate franchise at a value now equal to the aggregate value of the shares of its capital stock, deducting such portion of the value as is proportionate to the length of its lines without the state."

The tax imposed upon the Western Union Telegraph Company under this statute was also held valid in the case of *Massachusetts vs. Western Union Telegraph Company,*

141 U. S., 1, 40. This last case cites the previous case from the same state and affirms it in every particular. We fail to see any substantial difference between the Massachusetts cases and the case at bar. In both cases the statute required the consideration of the franchise of the company, and in both cases the franchise was considered in arriving at the value of the company's property. This is not disputed.

Plaintiff in error relies largely upon a case from the Supreme Court of California, where all of the property of the Western Union Telegraph Company was first taxed and the taxes paid and then there was another tax specificially against the franchise of the company. The court in that case held that it was not a property tax, but a tax against the company's right to exist. Defendant in that case relies largely upon the case of *McCulloch vs. Maryland*, and upon *California vs. Pacific Railroad Company*, 127 U. S., 41. Both of these cases have been criticised by later decisions of the Supreme Court of the United States. The case of *McColloch vs. Maryland* is referred to in *Thompson vs. Railroad Company*, 9th Wall., 579, and the court there limited its application to corporations organized by the Congress of the United States.

See also:

National Bank vs. Commonwealth, 9 Wallace, 353.

In the case of the *Central Pacific Railroad Co. vs. California*, 162 U. S., 91, the tax upon the Central Pacific Railroad Company was upheld, although it had been decided in the previous case, referred to in *San Francisco vs. Western Union Telegraph Co.*, that the tax against the Central Pacific Railroad Company by the State of California, which considered the franchise of the company, was invalid. In *Central Pacific Railroad Co. vs. California*, 162 U. S., 91, the record is very similar to the case at bar. The court considers the case reported in 127 U. S., 1, and says (loc. cit. page 125):

"Thus it is re-affirmed that the property of a corporation of the United States might be taxed, though its

franchise, as for instance its corporate capacity and its power to transact its appropriate business and charge therefor, could not be. It may be regarded as permanently settled that, although corporations may be agents of the United States, their property is not the property of the United States but the property of the agents and that a state may tax the property of the agents subject to the limitations pointed out."

Railroad Company vs. Pemiston, 18 Wall., 5.
Van Brooklin vs. Tennessee, 117 U. S., 151.

The court, continuing the opinion, holds that the Pacific Railroad Company held a state franchise as well as a federal franchise, although the company contended that it held no franchise from the state whatever. It was said by the court that although the company's only franchise was a grant from Congress, nevertheless the franchise which it enjoyed under the protection of the laws of the state was of value and the two were not so blended as to prevent the state from taxing the franchise of the company which eminated from the state. It was said that it would be presumed that the state board in consdering the company's franchise considered that portion of the franchise which it was legal for the state board to consider and not that portion which was not subject to taxation.

In *St. Louis vs. Western Union Telegraph Company,* 148 U. S., 92, it was held that the act of Congress referred to in the answer of the defendants in that case, and in the case at bar, did not grant the privilege of occupying any portion of the public streets of St. Louis without compensation to the city, and that the right to set its poles in said streets was a valuable privilege for which St. Louis had the right to recover. So that under the decision of the Supreme Court of the United States the company in the case at bar has, and is using in this state, a valuable franchise other than the franchise it receives from the United States. We insist, however, that even if it had no other franchise whatever the tax in this case is essentially a property tax. and that the word "franchise" as used in the resolution of the

board of equalization and in the statute does not mean simply the right of the company to exist, or its right to extend its lines, as granted by congress, but it refers to the valuable property of the defendant designated as its intangible and incorporeal property, and taxation of such property is fully sustained by the decisions of the Supreme Court of the United States in the Massachusetts cases above referred to.

In *Western Union Telegraph Company vs. Taggart*, 163 U. S., 1, the same question was considered in all its essential particulars as that under consideration in the case at bar. The method pursued in arriving at the assessment in that case was by assessing the proportion of the value of the whole capital stock which the length of the lines within the State of Indiana bears to the whole length of its lines. That necessarily involved a consideration of the value of all of the company's property, tangible and intangible. It is there said:

> "The principal grounds upon which the plaintiff contends that the statute of Indiana of March 6, 1893, is unconstitutional and the value and assessment of the plaintiff's property under it invalid are, that they necessarily include a taxation of franchises granted to the plaintiff by the United States, as well as of the plaintiff's property outside of the State of Indiana, neither of which was subject to taxation in that state; and also, by taking the market value of shares of the plaintiff's stock, etc., adopted an arbitrary rule and imposed an unlawful burden upon interstate commerce. But in each of these respects the case presented by this record appears to us to be governed by previous decisions of this court."

Mr. Justice GRAY, who delivered the opinion, then comments favorably upon *Western Union Telegraph Company vs. Massachusetts*, 125 U. S., 530, and *Telegraph Company vs. Massachusetts*, 141 U. S., 40, and, founded upon these cases, the Indiana tax is sustained.

> "The property of a telegraph company within a state is subject to state taxation like all other property. The fact that the company is engaged in interstate commerce, or

that it is an agent of the government, can afford no immunity from taxation of its property."

A. & E. E. C. L., Vol. 25, page 873, citing cases already mentioned in this brief, and in addition thereto:
21 American & English corporation cases, 13.
Taylor vs. Secor, 92 U. S., 975.
Philadelphia Electric Railroad Company vs. Pa., 15 Wall., 232.
Louisville Railroad Company vs. Railroad Commissioners, 19 Federal Reporter, 710.
Western Union Telegraph Company vs. State, 9 Baxter (Tenn.), 509.
Lelouf vs. Mobile, 196 U. S., 640.

It appears to us that there should be no great difficulty in this case when the distinction recognized in the foregoing cases is carefully noted. That is to say, a tax upon the property of the company, where reasonably and justly ascertained, has been universally sustained by the courts; but wherever a tax has been imposed upon its right to exist, or upon its right to transact its business, the tax has not been sustained. The word "franchise" is somewhat confusing, because in its technical sense it may be used to denote the right of existence and power to transact the business of a company, while in another sense it is used to denote intangible property, which is a thing of value that has resulted from the right of existence and business of the company. In its former sense it is not taxable, for it is not susceptible of valuation, and the right of taxation would involve the right of confiscation, which would be illegal. But in its latter sense, as a thing of value, although intangible property, it *is* taxable. It is entirely lawful and right for the assessing authorities to consider this intangible property and franchise of the company in arriving at the value of its property in the state subject to taxation. It would be difficult to find cases more directly in point than those heretofore cited from the Supreme Court of the United States, where the same question and the same statute was involved as in the case at bar.

We call the court's special attention to the fact that the plaintiff in error has not proven or attempted to prove that the valuation of the state board was an excessive valuation on its property as a telegraph line. It is not claimed that, if considered as a producing concern, the property in Missouri is valued by the board at too high a figure. It is virtually admitted by the pleadings, as it is not denied, that the total valuation, assessed by the board, of the property of the company in Missouri is fair and reasonable, but it is contended that the board had no right to consider anything except the items of tangible property of the company, and had no right to place any value upon them, except their value as separate and distinct articles. This contention is not sustained by any decisions of the Supreme Court of the United States. In fact, it is expressly held that the assessing authorities have the right to consider, value and assess the intangible property of this identical corporation.

The only real question on this feature of our case is whether the board had power to assess the property as a telegraph line, or were they confined to a consideration of the poles, wires and instruments as so many disconnected items of property.

It is entirely immaterial how the board of equalization chose to itemize the property of the company. It was necessary under the statute, however, that they give the number of miles of wire and poles of the company in order that it might appear that the statute had been complied with, which requires that the board assess in Missouri a proportion of the total value of the company dependent upon the number of miles of wire and poles in Missouri when compared with its total mileage throughout the United States. After itemizing these matters the board found that there was other property which, taken in connection with these as a complete system, is worth so much in addition. It will be noted by the court that the resolution which was introduced in evidence, showing what the board considered in making up this valuation, did not refer to any specific item, but to all the items, and the board declared that they considered all of these things in valuing the entire property of the company. There

was no evidence to the contrary and there could have been none.

A recent case from the Supreme Court of the United States is *Weir vs. Norman,* 166 U. S., 171. The distinction above referred to is there expressly made, where the court say:

> "A state tax upon the *franchises* of corporations engaged in interstate commerce is not a tax on franchises in the technical sense, but a tax upon the intangible property of such companies upon the basis of their mileage, and must be sustained."

In *National Bank vs. Commonwealth,* 6 Wallace, 353, it is said:

> "The limitations against the taxations of Federal agencies is that the agencies of the Federal government are only exempted from state legislation in so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the government."

In *Railroad Company vs. Pemiston,* 18 Wallace, 5, loc. cit. 30 Mr. Justice STRONG delivered the opinion of the court and considers this whole matter in the most elaborate detail. It is there said:

> "There are, we admit, certain subjects of taxation which are withdrawn from the power of the state, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the autority of the national government is legitimately exercised within the states. While it is true that the government cannot exercise its power of taxation so as to destroy the state governments, or impair their lawful action, it is equally true that the states cannot levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the national government. The constitution contemplates that none of those powers may be restrained by state legislation. But it is often a difficult question whether a tax imposed by a state in fact invades the domain of the general government, or interference with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely effects the efficient exercise of a Federal power is for that reason alone prohibited by the Constitution. To hold that would be to deny to the states all power

to tax persons or property. Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken and to that extent diminishes the subject upon which Federal taxes may be laid. Hence, the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy necessary powers of the state, or prevent their efficient exercise. These observations are directly applicable to the case before us. It is insisted upon behalf of the plaintiffs that the tax of which they complain has been laid upon an agent of the general government, constituted and organized as an instrument to carry into effect the powers vested in that government by the Constitution, and it is claimed that such an agency is not subject to state taxation."

The court then proceeds to admit that the Union Pacific Railroad Company was created to subserve the lawful purposes of the national government, and that it was organized to construct and maintain a railroad and telegraph line to be used in part by the government, and that the government, under certain contingencies, would become the owner of the property, and says:

> "It is unnecessary to mention this in detail. They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices of the general government. Notwithstanding this, the railroad and telegraph lines are neither in whole nor in part the property of the government. Admitting then fully, as we do, that the company is an agency of the general government, and accordingly employed in legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from state taxation?"

The court then cites numerous authorities and comments upon them, showing that the property of such an agent of the government is taxable, and concludes:

> "It is therefore manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agent, or in the meaning of the Constitution, upon the fact that they are agents, but upon the effect of the tax. That is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient

exercise of that power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of the Federal power. In this case the tax is laid upon the property of the railroad company precisely as was the case complained of in *Thompson vs. Union Pacific*. It is not imposed upon the franchise, or the right of the company to exist and perform the functions for which it was brought into being, nor is it laid upon any acts which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent taxed in common with all other property in the state of similar character; but it is impossible to maintain that this is an interference with the exercise of any power belonging to the general government, and if it is not, it is prohibited by no constitutional implication."

In *Adams Express Co. vs. Ohio,* 166 U. S., 220, this court affirms previous decisions, and states the law as follows:

"As to railroad, telegraph and sleeping car companies engaged in interstate commerce, it has often been held by this court that their property in the several states, through which their lines of business extend, might be valued as a unit for the purpose of taxation, taking into consideration the uses which it was put to and all of the elements making up an aggregate value, and that a proportion of the whole, fairly and properly ascertained, might be taxed by the particular state without violating any Federal restraint. The valuation was thus not confined to the wires, poles and instruments of the telegraph company, or the road bed, ties and spikes of the railroad company, or the cars of the sleeping car company, but included the proportionate part of the value resultant from the combination of the means by which the business was carried on, a value extending to an appreciable extent throughout the entire domain of operation."

It will be difficult to find a case more directly involving the questions at issue.

It must be admitted that, under the ruling in these cases, all the property of plaintiff in error, including the value of its franchises, is subject to taxation. The only remaining question, therefore for consideration of the court is whether or not the assessment

made by the state board in this case was a proper and legal assessment of that property. Of this there can be no reasonable doubt. The strongest possible argument as to the reasonableness of the assessment, and of the fact that it is a property tax, purely, is from the language of the resolution of the board in assessing this property.

The board sets forth in so many words, and with great detail, the fact that the assessment is purely an assessment against the property of the company, and not against its business, and it is no where intimated or claimed by the company that the assessment is excessive or unreasonable if the board had authority to take into consideration the value of its franchises. The only contention by the company has been, throughout this case, that its franchises having eminated from the Federal government, and being used as an agency of the Federal government were not taxable by the several states. This contention has been so positively and conclusively overruled that plaintiff in error must seek other grounds to defend against this assessment.

It is contended by plaintiff in error that these rulings by the Supreme Court of the United States, and the courts of last resort in several states, should not apply to Missouri, because the machinery for assessing franchises in Missouri has not been specifically provided. We hardly think this contention can be seriously made. The constitution and laws of this state provide that all property shall be subject to taxation, except such as is specifically exempt by law. It is not claimed that any of defendant's property has ever been exempted from taxation.

By section 9123, Revised Statutes of Missouri, the term "property" is held to mean and include every tangible and intangible thing, being the subject of ownership, whether animate or inanimate, real or personal.

This brings us back to the question as to whether or not there is proper machinery in Missouri provided for the assessment and taxation of property within the jurisdiction of its taxing authority. We see no more reason for questioning the authority and ability of the several taxing bodies

of the state to impose charges against intangible property than there is for doubting their power to tax tangible property. It may be, and probably is, advisable for the legislature to prescribe rules for ascertaining and reaching more adequately the intangible property of corporations, but the legislature has long ago provided that the board should consider the franchises of telegraph companies in arriving at the value of their property, and the plaintiff in error, as above set forth, has raised no question as to any improper step in this proceeding from beginning to end, except the sole ground that the board took into consideration the value of its franchises in estimating the amount of its assessment.

This question was recently raised in the Supreme Court of Washington where the Court said: "An assessment of a franchise for taxation is not invalid because the legislature has not provided a method for assessing the same."

Commercial Electric Light & Power Co. vs. Judson,
56 Pac. Rep., 829.

But this is not the first time the state board has assessed franchises for taxation, by any means. It is probably true that at every session of the board, for several years past, the franchise value of various corporations has been considered and valued in arriving at the amount of the assessed valuation of the property of the corporation. It is probably true that the several railroad systems of the state could be entirely reconstructed of new material for a little more than the assessed valuation, as made by the state board, and yet it could not be contended by those companies that the assessed valuation is more than 40 per cent of the actual value of the property, as determined by the earning power. This necessarily involves a consideration of the franchise of the companies. The taxes imposed against foreign insurance companies upon their premiums is nothing more than a franchise tax.

In discussing this question, Mr. F. K. Judson, in his recent

work on "Taxation in Missouri," on page 305, gives a summary of the law as follows:

> "It therefore follows that, whatever in a public grant, whether from the United States, state or city (unless exempt from taxation), materially increased the earning power of tangible property, has a taxable value and is rightfully subject to taxation, either on the basis of the market value of the securities representing such intangible and tangible property, or on the earnings of such entire property."

A statute providing for the taxation of franchises was passed in Kentucky several years ago which has given rise to much litigation and I shall refer to some of the cases upon this statute for a clear presentation of the question involved in the case at bar. Soon after this Kentucky statute was passed the Western Union Telegraph Company brought a suit to enjoin state auditor, Norman, from assessing its franchises for taxation. The bill sets forth at great length all of the facts presented in the answer in the case at bar, together with a great many additional claims. It was set forth in the bill that the company had paid for that year all the taxes upon all of its tangible property in the state, including its wires, poles and instruments, and that the proposed tax upon its franchise was illegal and void because of the very grounds set forth in the answer by plaintiff in error in our case. There was a demurrer to the bill which was sustained by Judge Barr of the United States circuit court in an elaborate opinion where he discusses fully all of the recent cases bearing upon the taxation of franchises of this company. The opinion of Judge BARR, among other things, holds:

> "The provision of Kentucky statute, number 1077, that certain classes of corporations and companies shall in addition to the other taxes imposed by law, pay a tax upon their franchises . . . . when construed with subsequent sections providing the method of ascertaining the value of such franchise, means a tax not on the technical corporate franchise, but on all of the intangible property of the corporation, or in the case of foreign corporations engaged in interstate commerce, on such proportion thereof as the length of their lines in the state bears to the total length of lines operated by them. Therefore the statute

does not violate the interstate commerce clause of the Federal Constitution, nor the 14th amendment."

Western Union Telegraph Company vs. Norman, 77 Fed. Rep., 13.

This case was appealed by the Western Union Telegraph Company, but after the decision of the cases in *Weir vs. Norman,* 166 U. S., 171, and other cases involving the same question, the appeal was dismissed.

In the last named case the Supreme Court of the United States say:

"Kentucky Statute of 1894, providing for a tax upon the 'franchise' of corporations, associations, etc., means not a tax on the franchise in a technical sense, but upon all the intangible property of corporations, and in the case of corporations engaged in interstate commerce, their intangible property should be assessed on the basis of their mileage within the state."

Weir vs. Norman, 166 U. S., 171.

"A telegraph company owning lines within and without this state is taxable in this state upon such proportion of its capital stock as is indicated by the proportion which the combined pole and wire mileage owned in this state by the company bears to the combined pole and wire mileage owned by the company."

Commonwealth vs. Western Union Telegraph Co., 2 Dauph., 40 (Pa).

"The right given telegraph companies by revised statute United States, No. 5263, to construct and maintain their lines on all post roads of the United States is permissive only and subject to all state or local legislation regulating its exercise."

Michigan Telegraph Co. vs. City of Charlotte, 93 Fed. Rep., 11.

"A corporation whose franchise has been assessed at its fair cash value by the board of valuation and assessment. cannot complain of inequality caused by the fact that other

officers have, in violation of the constitution and statutes, assessed property at less than its fair cash value."

Louisville R. R. Co. vs. Commonwealth, 49 S. W., 486 (Ky.).

"The fact that assessors have, in violation of law, assessed private property at less than its fair cash value does not effect the basis of value of franchises of corporations for taxation."

Paducah R. R. Co vs. McCracken, 49 S. W., 178 (Ky.).

"A state tax on the capital stock of a bridge company, consolidated from corporations of different states, which maintains an interstate bridge, is not a tax on the franchise conferred by the federal government although the corporation has authority under an act of Congress to contruct the bridge."

Keokuk Bridge Co. vs. People, 176 Ill., 267, affirmed 175 U. S., 626.

In a recent case the court of appeals of Kentucky enters into an elaborate discussion of franchise taxation and gave what we consider a clear definition of a franchise which is subject to taxation. The opinion is by Judge Durelle. After setting forth the provisions of the statute, Judge DURELLE states:

"From these provisions it is manifest that the so-called franchise tax is in reality a property tax upon the intangible property of the corporations named in the act, and so in *Henderson Bridge Co. vs. Kentucky,* 166 U. S., 154, the Supreme Court in considering this statute said: 'The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the court of appeals.' And in *Adams Express Co. vs. Commonwealth,* 166 U. S., 180, the Supreme Court said: 'We agree with the circuit court that it is evident that the word franchise was not employed in a technical sense and the legislative intent is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and of all foreign and domestic companies, possessing no franchise, should be valued at its entirety, the value of the tangible property be deducted and

the value of the intangible property be thus ascertained and taxed for these purposes.' And so this court, in *Henderson Bridge Co. vs. Commonwealth*, 99 Ky., 639, held that the term 'intangible property' was used synonimous with 'franchise.' The sections referred to show conclusively that their object was to obtain a valuation of property for the purpose of taxation. The corporate power sought by this statute to be subjected to taxation may be said to be the added value which the exercise by the corporation of any special or exclusive privilege or franchise, not allowed by law to natural persons, gives to tangible property. For example, a railroad track without the right of operating a railroad, would be of small value, with that right it might be worth millions of dollars."

Louisville Tobacco Warehouse Co. vs. Commonwealth, 49 S. W., 1069 (Ky.).

"Kentucky statutes, 1894, providing for a tax on the franchise of corporations, etc. . . . should be construed not as a tax on the franchise in a technical sense, but upon all the intangible property of the corporation."

Owensboro National Bank vs. City of Owensboro, 173 U. S., 664.

"A state franchise tax upon private corporations, based on the amount of capital employed by the corporation in the state, is not affected by the character of the property in which the capital is invested, and is, therefore, not rendered illegal by the fact that such capital is employed in interstate or foreign commerce."

People of the State of New York vs. Roberts, 19 Sup. Ct. Rep., 58.

Every reason which plaintiff in error could possibly urge against the taxation of the value of its franchise could also be urged with equal force against the taxation of its poles, wires and instruments. The franchise being a thing of value, and property in every sense, has no attribute which should exempt it from the consideration of assessing authorities. The same reasons which are urged by this company could also be urged by every corporation which is engaged in interstate commerce. It

has been so often decided as to be a question now beyond controversy, that the state cannot levy any tax against the instruments of interstate commerce or the agencies of the federal government which would amount to a regulation of commerce or an interference with the business of such agencies. But with the same unanimity the courts have held that a tax against the property of such companies is not such a tax as amounts to an interference with commerce or a regulation of the business of such government agencies. The statute in Missouri does not provide even for a personal judgment against the company. The utmost limit of the authority of the taxing officers, when followed to its conclusion, is to take a portion of the property owned by the company in this state.

It appearing, therefore, from the resolution of the state board of equalization, and from the statute and all proceedings involved in this case that the tax is simply a property tax against the property of the company, and that it has been legally assessed and levied, and that there is no objection by the company as to the amount of the assessment or the validity of the taxes under the assessment, provided the board had authority to consider and value its franchises, the taxes should be sustained, and the petition in error dismissed.

II.

This brings us another feature of this case, which appears to us equally conclusive against the plaintiff in error. We do not raise this question because we consider it in any way necessary to the case, but because it is a matter of principle of great importance, and would relieve the courts of much useless litigation if once thoroughly established as the law. We believe that the legislative authority of Missouri intended that the state board of equalization should be the supreme judicial authority in determining matters placed clearly within its jurisdiction, that is to say, the valuation of property owned by corporations subject to taxation. A method has been provided and approved by

which the rulings of the board could be reviewed in a direct proceeding. This method should be exclusive of all others, and when not pursued, the proceedings of the board should be final and conclusive in a suit for the collection of the taxes.

Our statutes provide for an appeal from the decision of the board. Section 9278, Revised Statutes of Missouri: "The right of appeal to the Supreme Court of this State, under any of the provisions of this chapter, is hereby preserved to any and all persons, officers or parties in any wise affected thereby, as in other cases, and may be prosecuted as in other civil cases." The Supreme Court of Missouri, in its ruling upon the case at bar, construing the effect of this statute, states the law as follows: "The defendant cannot avail itself of these cases for the reason, first, that it seeks to raise the question of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the Board of Equalization."

We contend that the State Board is a judicial body, and that its decisions must be reviewed, if at all, in the manner pointed out by law. Under the decisions of our Supreme Court this may be done either by a direct appeal, or by a writ of *certiorari*, which may be obtained to carry up the record of the board to the Supreme Court for review. The telegraph company failed to take either of these courses, and is, therefore, precluded from contesting the finding of the board upon a matter which was entirely and properly within the jurisdiction of the board.

In support of this contention we request the court to consider the following authorities:

> "The courts, either of common law or equity, are powerless to give relief against the erroneous judgments of assessing bodies, except as they may be specially empowered by law to do so. This principle is applicable to statutory boards of equalization which are only assessing boards with certain appellate power, but whose action, if they keep within their jurisdiction, is conclusive."
>
> Cooley on Taxation, 2nd Ed., page 748.

"Where the assessors have jurisdiction of the person or

property assessed, they act judicially, and like the judgments of any other tribunal, their acts are conclusive until reversed in the mode prescribed by law. Whether the error be in the valuation of property, at too high a rate, or upon a wrong principle, or of property which is claimed as exempt, the decision of the assessors cannot be attacked collaterally. The remedy is by appeal to that tribunal provided by statute, and if there be none provided, then it is by *certiorari.*"

Burroughs on Taxation, page 238, Sec. 102.

"Where an erroneous or excessive valuation has been placed by the proper officers upon property in assessing it, for taxation, the courts cannot interfere in the absence of fraud; a tax based upon such an assessment can be attacked only for fraud or want of jurisdiction."

Hamilton vs. Rosenblatt, 8 Mo. A., 237.

The acts of the assessor and the board of appeals or county court in the matter of assessments are judicial.

St. Louis Mutual Ins. Co. vs. Charles, 47 Mo., 462.
North Mo. Ry. vs. Maguire, 49 Mo., 482.

Where one claiming that the assessment of taxes is excessive, has failed to apply to the board of appeals to have the alleged error corrected, the courts cannot interfere to stay the collection of the taxes.

Meyer vs. Rosenblatt, 8 M. A., 602, affirmed 78 Mo., 495.

The court can grant relief against the mistake in judgment of the board of equalization, only by a direct proceeding in the manner provided by law.

State ex rel. vs. Hannibal & St. Joseph R. Co., 101 Mo., 120.

The duties of the county boards of equalization in equalizing the valuation of property are judicial.

Black vs. McGonigal, 103 Mo., 192.
St. Louis Lead Co. vs. Simms, 108 Mo., 222.

And their orders cannot be impeached, except for want of jurisdiction or for fraud.

State ex rel. vs. Vaile, 122 Mo., 33.

To correct an assessment against a bank on the ground that it is excessive, an appeal must be taken to the county board of equalization.

State ex rel. vs. Bank or Neosho, 120 Mo., 161.

An assessment of the stock and notes of a manufacturing company, as ordinary personal property, instead of under the law for licensing and taxing manufacturers, is not void, but a mere illegality which may be corrected by an appeal as provided by statute, and if the assessed company does not appeal it cannot complain so long as its property is clearly taxable under any statute.

State ex rel. vs. Brown Tobacco Co., 140 Mo., 218.

The ascertainment of the rate and amount of levy of such taxes by the county court is an act judicial in its character, and such rate and amount of levy cannot be increased or diminished by the circuit court, nor otherwise revised by it.

State ex rel. vs. K. C. St. J. & C. B. R. Co., 149 Mo., 635.

A taxpayer can avoid excessive valuation only by appealing from the action of the board of supervisors to the judge of the county court, as provided by Ky. statute, Sec. 4128, and not by enjoining the board.

Mossett vs. Newport & C. Bridge Co., 50 S. W., 63 (20 Ky. Law Rep., 1969).

A decision by railroad commissioners——assessing railroad property for back taxes, cannot be collaterally assailed except for fraud.

Yazoo & M. V. R. R. Co. vs. Adams, 25 So., 355 (Miss. '99).

If the action of the commissioners in adjusting and reducing values was improper or illegal this fact should be established by proceedings intended for and adapted to such an inquiry, and not by injunction in a collateral case.

Nichols vs. City of Wilkesbarre, 9 Kulp., 371 (Pa. Com. Pl., '99).

Where a corporation has failed to avail itself of the remedy prescribed by law in case of illegal assessments for taxation it cannot afterwards question either the quantum or the validity of the tax.

People vs. Manhattan Fire Ins. Co., 59 N. Y. Sup., 1007.

Rev. Statutes Wis., Sec. 1061, provides that the board of review for the equalization of tax assessments shall, when satisfied from the evidence taken that the assessors valuation is incorrect, lower or raise the same accordingly. Held, that the duties of the board were quasi judicial in character and that their determination within their jurisdiction, made in good faith, were not subject to review by the courts.

Brown vs. Oneida County, 79 N. W., 216 (Wis. '99).

In the absence of fraud or bad faith on the part of the assessor his judgment of the value of property for the purposes of taxation is conclusive, unless modified by the board of equalization.

Home Fire Ins. Co. vs. Lynch, 56 P., 681 (Utah '99).

Rev. Statutes of Mo. 1889, Secs. 7520-7572, provide that one feeling himself aggrieved by an assessment may appeal from the assessor to the county board of equalization, give a remedy at law for such grievance, and an action will not lie in equity to enjoin the collection of the taxes.

National Bank of Unionville vs. Staats, 55 S. W., 626 (155 Mo., 55).

"Since there is no statute allowing an appeal from the action of the county assessor and board of county commissioners, sitting as a board of equalization——courts will not interfere with the action of these officers where it does not appear that the assessor did not act fairly and honestly, or that the board of equalization did not give plaintiff a fair hearing."

Danforth vs. Livingston, 23 Mont, 558, citing the following:

Ins. Co. vs. Pollak, 75 Ill., 294.
Porter vs. R. R. Co., 76 Ill., 561.
Gage vs. Evans, 90 Ill., 570.
Trust Co. vs. Weber, 96 Ill., 346.
Gas Co. vs. January, 57 Cal., 616.
Attorney General vs. Supervisors, 42 Mich., 72.
Wilmington C. & A. R. R. Co. vs. Board of Commissioners of Brunswick Co., 72 N. C., 10.
Wade vs. Commissioners, 74 N. C., 81.
International & G. N. R. R. Co. vs. Smith County, 54 Tex., 1.
Hamilton vs. Rosenblatt, 8 Mo. App., 237.

The territorial board of equalization is the final tribunal of review with power of correction to the end that valuations shall be made to conform to the requirements of the law and that all property shall be assessed at its true value.

Wallace vs. Bullen, 52 P., 954 (Ok., '99).

In the absence of fraud or malice the action of the assessor and county board of equalization in assessing personal property is final.

Baker vs. King County, 50 P., 481 (17 Wash., 622).

For relief against excessive or irregular taxation under state laws the citizen must apply to the board constituted to pass upon such complaints, and in the event of his failure to do so the judgment of the assessing officers in cases within their jurisdiction is not open to collateral attack.

Ledoux vs. La Bee, 83 Fed., 761.

In the absence of fraud or mistake a bill in equity will not lie to review or revise an assessment the remedy by appeal to the county board, as provided by Rev. St. c. 120, Sec. 97, being adequate and exclusive.

Beidler vs. Kochsperger, 49 N. E., 716 (171 Ill., 563).
Kochsperger vs. Larned, 49 N. E., 988 (172 Ill., 86).

Proof of fraud or misconduct, and not merely of an error of judgment, is necessary to warrant setting aside the assessment.

Maish vs. Territory of Arizona, 17 S. Ct., 193, 164 U. S., 599.

The decision of a board of equalization on the complaint of one against whom an assessment has been levied is final and the consequent order a final one.

Webster vs. City of Lincoln (Neb., '96), 69 N. W., 394.

The action of a board of equalization in raising an assessment of personal property being final, and no appeal having been given by statute where such action was taken regularly on notice and after the introduction of evidence, and the property is such that there may be an honest difference of opinion as to its value, an allegation of fraud in general terms based solely on the act of the board in placing, what is claimed to be too high a valuation on the property, is not sufficient to give the court jurisdiction to review such action.

Olympia Water Works vs. Gelback, 48 P., 251, 16 Wash., 482.

As the state board of equalization acts judicially in determining what property should be assessed, and in fixing the amount of the assessment, its judgment cannot be collaterally attacked by the receiver for the property owner in resisting a claim for the taxes assessed.

McLeod vs. Receveur, 71 Fed., 455, 18 C. C. A., 188.

Assessments for general taxation are not subject to review by the courts, except under a writ of *certiorari* allowed by the laws 1888, c. 269, No. 2.

Brooklyn El. R. R. Co. vs. City of Brooklyn, 39 N. Y. S., 154.
King Co. El. R. R. Co. vs. Same, Id.

Ceritorari is a proper remedy to review an increase of the assessment of personal property.

State ex rel. Harrison Co. Bank vs. Springer, 35 S. W., 586 (134 Mo., 212).
Wheeler vs. Board of Commissioners of Waldo Co., 88 Me., 174.

Boards of review are independent tribunals having power to alter tax returns upon evidence satisfactory to themselves and conclusions rendered by them, while acting within the scope of their authority, are not subject to review by the court.

Gerks Brewing Co. vs. Hagerty, 1 Ohio N. P., 68.

A suit to compel payment of a tax cannot be defended on the ground that the national bank stock on which it was levied was not taxable on account of its being pledged as security, the remedy being by appeal from the assessment.

Town of Farmington vs. Downing (N. H.), 30 A., 345.

The action of a county board of revision in revising and increasing a person's tax schedule after having obtained jurisdiction over him by statutory notice, is not subject to collateral attack by a suit to enjoin the collection of the taxes; the remedy being by an appeal to the state board of tax commissioners.

Senour vs. Machett (Ind. Sup.), 40 N. E., 122.
Jones vs. Cullen (Ind. Sup.), 40 N. E., 124.

A taxpayer's only remedy to review the erroneous assessment of a tax, which it was within the jurisdiction of the taxing

officers to levy, is by *certiorari*, as provided by acts 1880, c. 269.

U. S. Trust Co. of N. Y. vs. City of N. Y., 144 N. Y., 488.

Where part of the price of land was paid with pension money, whereby the land is to that extent exempt from taxation, the assessors act judicially in assessing the taxable portion and their determination cannot be collaterally attacked.

In re Peek, 30 N. Y. S., 59.

THE FRANCHISE VALUE IS TAXABLE.

The telegraph company will not be heard to say that it is exercising no franchise within the State of Missouri save that obtained from the Federal government by virtue of the act of Congress of 1866, whereby it was given authority to construct and maintain its poles and wires over and along the military and post roads of the United States. The franchise eminating from the Federal government is a small matter when associated with the franchise value created by virtue of and eminating from the State government. There is no town or city of any importance in the State in which the company in question has not constructed over the streets and public grounds its wires and poles and is maintaining offices for the transaction of its business. The construction of such property is to a certain extent a burden to the public in the way of inconvenience in travel and traffic and by virtue of the laws of the State the property of the company is protected from injury or destruction. It receives the same protection and is entitled to the same privileges as though it were a company organized under the laws of Missouri. In addition thereto, as has been held by the Supreme Court of the United States, a franchise value is not alone such as eminates from the government conferring the right upon a corporation to do business, but may consist in anything of an intangible character which adds value to the property. Taking into consideration all of the property of the telegraph company, together with their connections and the use to which it is put, the real market value is obtained, and after deducting from this the actual value of the tangible property, the intangible or franchise value may be obtained.

But it is unnecessary to discuss this proposition further, as the Supreme Court of the United States has on several occasions held that there is an intangible or franchise value belonging to the Western Union Telegraph Company in other states, and if it exists in other states we see no reason why it is not also in existence in Missouri, because the same conditions exist in one state as well as in another.

But under the assessment made by the state board it will not do to say that the item of $856,400.56 represents the value of the franchises derived from the Federal government by virtue of the act of Congress before referred to or that such Federal franchise is included in the item together with other intangible values. The testimony of one of two members of the state board (who were the only members of said board testifying) show that the Federal franchise or the right to construct the poles along the military and post roads of the United States by virtue of the act of Congress, was not included in such item. The other member not being questioned as to it.

This case seems to fall clearly within the case of *Adams Express Co. vs. Ky.*, 166 U. S., 179, and *Western Union Telegraph Co. vs. Norman*, 79 Federal Reporter 13. In the first above case the statutes of Kentucky provide that every corporation, company or association having or exercising any special or exclusive privilege or franchise or performing any public service, shall in addition to the other taxes imposed on it by law annually pay a tax on its franchise to the State, and a local tax thereon to the county, city, town and taxing district where the franchise may be exercised. Chief Justice FULLER in this case remarked: "But taking the whole act together, and in view of the provisions of sections 4078, 4079, 4080 and 4081, we agree with the circuit court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations and of foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted and the value of the intangible property thus ascertained be taxed under said provisions; and as to railroad, telegraph, telephone, express and sleeping car companies whose lines extend beyond the limits of the state, that their intangible property should be assessed on the basis of the mileage of their lines within and without the state."

So also it may be said in the case at bar the franchise value contemplated by the law-making power is not to be used in a technical sense, nor shall the word "franchise" be given a technical meaning or application, as the legislative intention seems to be plain in subjecting all of the property, whether tangible or intangible, to taxation, so that it makes no difference whether the item referred to in the assessment of the telegraph companies be designated as franchise values, as intangible property values, or as "all other property." We call the courts' attention to section 9123 of the Revised Statutes of Missouri of 1899, which defines certain terms as applicable to the assessment of property in this state. By this section property is divided into three classes and definitions given when taken together include not only tangible, but intangible values as well. In the order given in this section we find the term "real property" defined first; second, "personal property" as well as capital stock, shares of stock and bonds of corporations; and, lastly, the section contains the following: "The term property whenever used in this chapter shall be held to mean and include every tangible and intangible thing, being the subject of ownership, whether animate or inanimate, real or personal." This provision of our revenue law is sufficient not only to justify the said board in assessing the intangible property of the Western Union Telegraph Company, but in designating its intangible property as "all other property." In discussing the question of taxing the intangible values of property, Judge BREWER, in the case of *Adams Express Co. vs. Ohio*, 166 U. S. loc. cit., 222, said: "But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purpose of income and sale $16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market, and the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale." At another place in the same opinion we find this language: "But where is

the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all this separate business and articles of tangible property, by the contracts, franchises and privileges which it has acquired and possesses it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000, and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the working of the great machine, or in the state giving it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly we think the latter. Every state in which it is transacting business and where it has property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that with that tangible property it is combining contracts, franchises and privileges into a single unit of property, and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the entire property."

If, however, this court should hold that the assessment can be reviewed and attacked in this proceeding, the question next to be considered is whether the state board intentionally and knowingly assessed the tangible property of the Western Union Telegraph Company, so as to require, and for the purpose of requiring, it to pay more than its proportionate share of the burdens of state taxation, thereby violating sections 3 and 4 of

article X of the Constitution of Missouri and the 14th amendment to the Constitution of the United States.

The trial court found against the telegraph company on this question, under the evidence adduced at the trial.

An examination of the record of the state board of equalization shows that the 6,075.98 miles of poles were assessed at $71.50 per mile, and that the 23,766.34 miles of wires were assessed at $22.02 per mile, while 2,375 instruments were assessed at $5.70 each. The averment in the answer of the company in this connection is to the effect that the state board of equalization, by a common arrangement, understanding and purpose among themselves, in violation of the Constitution and laws of said State of Missouri, with intent to compel defendant to pay a greater proportion of taxes than the owners of other real and personal property, assessed all property other than property of telegraph companies at from 35 per cent. to 40 per cent. of its true value, thereby unlawfully and wrongfully discriminating 60 per cent. of the amount of taxes levied by said board, the property of telegraph companies being assessed at its true value.

There was no evidence introduced showing the assessed valuation or the true valuation of any other telegraph properties than that of the Western Union; nor was there any evidence introduced showing the per cent. of the true value of real and personal property assessed by the various county assessors throughout the state and equalized and adjusted by the state board other than the single question asked ex-Secretary of State Lesueur at page 28 of the Abstract of Record. The question is as follows:

"Q. Now, Captain, will you kindly state, if you can, what would be a fair average figure that would represent the proportion of actual value adopted throughout the state during the past five years for assessment of real and personal property? A. Well, I would reply to that, that taking personal property and real property all together outside of the city of St. Louis, the average valuation was about 40 per cent."

Counsel for the company did not ask the members of the state board of equalization while taking their testimony whether or not the property of the Western Union was assessed at the same proportionate rate to its true value as other real and personal property throughout the various counties of the state. There was no evidence whatever upon this vital point.

In this connection it will be observed that the state board of equalization acted in a quasi judicial manner, and their actions are presumed to be legal and binding. It devolves upon those who attack the legality of their procedings to prove the alleged fraud or irregularity. In this case the court below was right in holding the evidence to be insufficient, even though it be held that the procedings of the state board can be inquired into under the pleadings in this case. Both members of the state board whose testimony was introduced show conclusively that all things were considered as stated in the order of the board when the assessment was made upon the property of the company. The statute authorizes them to obtain such testimony and evidence as they may deem sufficient or necessary and to obtain any evidence whatever as to the value of the property that might be in aid of determining the assessment. It is true the company made returns as provided by law, and appeared by its attorney, Mr. Smith, whose statements are set out as an exhibit, yet the law gives the board the right to go beyond the return of the company and the evidence which the company may present, and to disregard both the statements contained in the return as well as the evidence offered by the company in the event they deem it necessary in order to obtain the proper assessment.

The presumption is that when the state board of equalization assessed the property of the company in question it took into consideration all the elements of value as well as the proportionate rate to its true value of all other property, personal and real, assessed by the various county assessors and as equalized and adjusted by the state board. Before this presumption will

be invaded or set aside it must be satisfactorily shown that some irregularity exists or that the board ignored the relative assessments of other property throughout the state and ignored, alike, the real value of the company's property. It is true that one T. P. Cook, superintendent of the Western Union Telegraph Company at St. Louis, testified in this case and made certain statements as to the valuation of the poles and wires and other property of the company, yet in view of the credit and faith that should be given the finding of the state board, who are officers sworn by law, the testimony of Cook alone should not be held sufficient to overturn the finding of the board when the company was given an opportunity to question certain members of the board when they testified in the case, as to the actual value of the property considered in making the assessment, and whether or not they assessed the property of the company at its market value or on the basis of 40 per cent. of its market value, as it is alleged other property throughout the state is assessed.

We take it that the court below found correctly as to these matters and its findings will not be disturbed.

Being clothed with the ordinary presumption of complying with all constitutional requirements in the mode and manner of assessment of property, and that presumption not having been overturned by evidence, and the actions of the board not having been shown to have been illegal in any respect, the company will not be heard to complain at this time.

We need not take issue with counsel for the company on the proposition that an equitable defense might be interposed for the purpose of setting aside the assessment if the board of equalization arbitrarily, intentionally or fraudently fixed a valuation upon the property at more than its full or actual value, or upon a greater valuation than that fixed upon other real and personal property throughout the state. The authorities submitted on the part of the company upon this proposition will not be questioned, but we submit to the court that they are not applicable and

cannot properly be construed as determining the legality of the assessment in question under the pleadings and the evidence.

Equity will not relieve against a mistake in judgment as to the valuation to be placed upon any particular piece of property.

The courts cannot in such cases take upon themselves the function of a revising and equalizing board.

Newman vs. Supervisors, 45 N. Y., 676.
National Bank vs. Elmyra, 53 N. Y., 49.
Bruecher vs. Fortchester, 101 N. Y., 240.
Hicks vs. Westport, 130 Mass., 478.

Absolute equality and uniformity in assessments for taxation are seldom, if ever, attainable. The fallibility of the human judgment and the uncertainty attending all human evidence, precludes the possibility of this attainment. Intelligent men differ as to the value of property; therefore, the most that can be expected from wise legislation is an approximation to the desired end.

It is true that where over-valuation of property has arisen from the adoption of an arbitrary rule of appraisement which conflicts with the constitutional and statutory direction, and operates unequally not alone on a single individual, but on a large class of individuals or corporations, the party aggrieved may resort to a court of equity to restrain the exaction of the excess upon payment or tender of what is admitted to be due.

Cummings vs. National Bank, 101 U. S., 153.

There must be a systematic, intentional and unlawful undervaluation or over-valuation for taxation, which necessarily effect an unjust discrimination against a certain species of property. It was so held in the cases of *Taylor vs. L. & N. R. R. Co.,* 60 U. S. App. Rep., 170, and *Stanley vs. Supervisor,* 121 U. S., 535, both of which cases are referred to by counsel for the company in their brief.

As heretofore stated, the court will find that there is no

evidence whatever in this case, showing that the state board of equalization intended to place a greater proportionate valuation upon the Western Union's property than had been imposed upon other property in the state, nor is there any evidence that there existed a systematic, intentional and unlawful under-valuation for taxation by the taxing officers, which effected an unjust discrimination against the property. We have heretofore called the court's attention fully to this proposition and will not present the matter further.

We respectfully submit that the judgment of the Supreme Court of Missouri should be affirmed with costs.

HUNTER M. MERIWETHER,
Attorney for Defendant in Error.

With whom is

ROBT. E. BALL,
On the Brief.

Supreme Court of the United States.

No. 256.—October Term, 1902.

The Western Union Telegraph Company, Plaintiff in Error, vs. The State of Missouri at the Relation and the Use of Chris. Gottlieb, Collector of the Revenue for Jackson County, Missouri.	In error to the Supreme Court of the State of Missouri.

[May 18, 1903.]

The defendant in error is the tax collector of Jackson County, Mo., and brough this action against the plaintiff in error in the Circuit Court of that county for the sum of $1,027.22, the taxes assessed against plaintiff in error for the year 1899, apportioned to Jackson County. The answer of the plaintiff in error alleged illegality in the taxes upon ~~three~~ two grounds: First, that the taxes were levied upon the franchise of the plaintiff in error, derived from the United States under certain acts of the Congress; second, that the State board of equalization, intending to injure the plaintiff by compelling it to pay an excessive and disproportionate share of State and local taxes, assessed its poles, wires and instruments at far more than their actual value.

The plaintiff in error is a telegraph company, incorporated by the State of New York. It does business in the State of Missouri, having offices in a number of cities of that State, and its lines run between those cities and to and from them to other places in the Union; in other words, the plaintiff in error engages in intrastate and interstate business. It claims to have no franchises from the State of Missouri, (except in an unimportant instance,) but occupies the streets of its cities, and its public roads and highways, by authority of the act of Congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes." The material part of section one of the act is as follows:

"Section 1. That any telegraph company now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by an act of Congress, and over, under or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters and interfere with the ordinary travel of such military or post roads."

Section two provides that the messages between the officers and agents of the Government shall have priority, and be sent at rates to be fixed by the Postmaster General.

Section three forbids the transfer of the rights conferred by the act.

Section four gives the United States the power to purchase the telegraph lines, property and effects of any company availing itself of the benefits of the act.

Section four is as follows:

"*And be it further enacted,* That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by this act."

Under the constitution and laws of Missouri, the State board of equalization, composed of the governor, secretary of State, State auditor, State treasurer and attorney general, assesses railroad and telegraph property, and it also equalizes the real and personal property assessed by the local assessors. Exercising its powers of original assessment, the board made the following order in regard to the property of plaintiff in error:

"State of Missouri, office of State auditor.

"Be it remembered that heretofore, to wit, on the twenty-fifth day of July, 1899, the following, among other proceedings, were had by the State board of equalization, viz:

"The State board of equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company, through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidence of value, and all matters bearing upon the question of the value of the property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and the gross receipts and net earning power, and the franchise and value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its findings, conclusions and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the State board of equalization assesses and values for taxes of 1899 the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the State board of equalization that the assessed value thereof be distributed upon the classes of property as follows:

6,075.98 miles of poles at $71.50 per mile	$434,432 57
23,767.34 miles of wire at $22.02 per mile	523,356 82
3,375 instruments at $5.70 each	13,537 50
All other property at	856,400 56
	$1,827,727 45"

The apportionment of the tax to Jackson County was as follows:

For State purposes	$202 43
For county purposes	283 40
For road purposes	35 41
For general county school purposes	370 61
For school building purposes	2 98
For other school purposes	19 03
For Kansas City municipal purposes	81 21
For Independence municipal purposes	25 38
For Kaw township railroad purposes	2 03
For Blue township railroad purposes	4 74
Total	$1,027 22

The case was tried without a jury and the trial court found "the fact to be from the evidence and the pleadings that the defendant owned in the State of Missouri, at the time of said assessment, the poles, wires and instruments of the value hereinbefore set forth. And the court finds the fact to be from the evidence that in valuing 'all other property' of defendant the State board took into consideration the franchise of defendant company, and the court finds under the law, and so declares, that the franchise of defendant company is not subject to valuation and taxation, and as to this item of the above-named valuation the court finds the issues for the defendant."

Judgment was entered against plaintiff in error in the sum of $605.82, being the tax on the poles, wires and instruments of the company, with interest at two per cent for collectors' fees, and also for an attorney's fees. The amount found due was made a first lien against the property of defendant in error, and special execution ordered to be issued. Both parties moved for a new trial, which motions were denied. Both parties then appealed to the Supreme Court of the State, which court reversed the judgment of the Circuit Court. After an elaborate discussion of the case the Supreme Court said:

"It follows that the judgment of the Circuit Court holding that the tax assessed against 'all other property at $856,400.56' to be unlawful, is erroneous, and that the plaintiff is entitled to a judgment for the whole amount of the tax sued for. Judgment is accordingly entered for the plaintiff here for $1,027.22, back taxes for the year 1899, with interest thereon from the first of January, 1900, at the rate of one per cent per month (R. S. 1899, sec. 9225), and costs."

This writ of error was then sued out. Other facts appear in the opinion.

Mr. Justice McKenna, after stating the facts, delivered the opinion of the Court.

On the question of fact, if it be such, as to what the item "of other property at $856,400.56," in the assessment by the board of equalization, was constituted of the trial court and the Supreme Court of the State, are not

in accord. The trial court found the "fact to be from the evidence that in valuation 'of other property' of defendant, the State board took into consideration the franchise of defendant company." It is apparent from the court's opinion that by franchise the court meant the rights and privileges obtained by the plaintiff in error under the act of Congress of July 24, 1866. The Supreme Court of the State, however, expressed its conclusion from the evidence, as follows:

"So, that, when, in determining the value of the property of the defendant in this State, the board of equalization took into consideration 'the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof,' it did not and could not have included therein any franchise derived by the defendant from the Government of the United States, because that Government had conferred no such franchise; nor was such a valuation placed upon 'all other property,' a tax upon the franchise of the defendant company. The franchise derived by the defendant from the State of New York was considered by the board in determining the value of the property of the defendant located in this State. That is, that property was valued not as so many poles, so much wire, so many instruments or so much 'other property,' in the abstract, but was valued in the concrete, in the relation that such property in the abstract bore to other property in the abstract, which being brought into relation toward each other—into a *system*, located partly in this State and partly in other States, gave each part a concrete value, which was much greater than its abstract value. The right to exist—the franchise—of the defendant was property, and was subject to taxation, either directly, in the proportion that the portion of the franchise exercised in this State bore to the proportion of the franchise exercised in all other States, or indirectly, as was done in Massachusetts and was done here, by being impressed upon the tangible property owned by it, thereby increasing its value, and by considering the franchise and its tangible property as a system, and then assessing the part of the property forming a part of the system and located in Missouri as of its proportionate value of the whole property constituting the system."

Plaintiff in error asserts the correctness of the finding of the trial court, and insists that it is the only finding that could have been made, and bases the argument against the taxes assessed on that insistence. But if the finding on the question is one of fact, necessarily we are bound by that made by the Supreme Court of the State. The trial court picked out the rights given to the defendant under the act of Congress, denominated them a franchise, contemplated the franchise as a distinct proprietary entity, and, because it was derived from the Federal goverment, decided that it was exempt from taxation. The necessary consequence was and is to destroy the relation between that franchise and the other properties of the plaintiff in error, regarding them, not as parts of the system, but abstractly—regarding the poles not differently from other poles, the wire

not different from other wire. The Supreme Court, on the contrary, regarded the properties as related and as constituting a system, and because of their relation having a value greater than the sum of the values of the individual things regarded merely as such. Viewing the order of the board of equalization, as the Supreme Court viewed it, was it valid? In other words, is the State in exercising its taxing power limited to assessing the mere material things used by the plaintiff in error, and must it regard them as of no greater value than they had when they reposed in lumber yards and factories, with cost added of putting them in place. Or the proposition may be stated another way, which better expresses the ultimate contention of the plaintiff in error. Conceding that the tangible property of the telegraph company derives value from its use in a system, does the company do business in the State in pursuance of the Constitution of the United States and the act of July, 1866, and become thereby an instrument of interstate commerce and a government agent, and as such exempt from the taxation contested in this case? We think the question has been answered by this court.

In *Western Union Telegraph Co.* v. *Massachusetts*, (125 U. S. 530,) the effect of the act of July, 1886, upon the power of the State to tax the property of telegraph companies was considered. The laws of Massachusetts imposed a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which was ascertained by comparing the length of its lines within the State with the length of its entire lines. The tax was sustained. The act of July, 1866, was urged against the tax as it is urged here.

The contentions of the company in that case was, as it is in this, that it did not derive its existence from the State of Missouri, but from the State of New York; that it did not do business in the State of Missouri by permission of that State, but by virtue of being an instrument of interstate commerce; that its rights and privileges and franchises were conferred by the United States and constituted it an agent of the United States, and as such agent it was exempt from the tax imposed. The contentions were rejected. The court did not test or measure the power of the State by the name which its laws gave the tax, and, speaking by Mr. Justice Miller, said:

"The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited, cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein."

And that power of the State was explained in an elaborate opinion and sustained. These propositions were laid down: The company owed its existence as a corporation and its right to exercise the business of telegraphy to the laws of the State under which it was organized; that the privilege of running the lines of its wires over and along the military and post roads of the United States was granted by the act of Congress, but that the statute was merely permissive and conferred no exemption from the ordinary burdens of taxation; that the State could not by any specific statute prevent a corporation from placing its lines along the post roads or stop the use of them after they were so placed, but the corporation could be taxed in exchange from the protection it received from the State "upon its real or personal property as any other person would be." And describing the particular tax imposed it was said:

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263 of the Revised Statutes or by the commerce clause of the Constitution."

In other words, the lines in Massachusetts were regarded as a part of a system and assessed accordingly.

The statute of Massachusetts came up again for consideration in *Massachusetts* v. *Western Union Telegraph Co.*, (141 U. S. 40,) and the principles announced in *Western Union Telegraph Co.* v. *Massachusetts, supra*, were affirmed and followed. See also *Batterman* v. *Western Union Telegraph Co.*, (127 U. S. 411;) *Leloup* v. *Port of Mobile*, (Id. 640.)

These cases establish that in estimating the value of the property of a telegraph company situate within a State it may be regarded not abstractly or strictly locally, but as a part of a system operated in other States, and that the State was not precluded from taxing the property because the State had not created the company or conferred franchise upon it, or because it derived rights or privileges under the act of July, 1866, or was engaged in interstate commerce. Every one of the fundamental propositions, therefore, contended for by plaintiff in error, those decisions declare unsound.

But it is contended that the method of assessment followed in those cases was sustained because they were prescribed by the legislature, and that in the case at bar the method adopted was not prescribed or authorized by the laws of Missouri. The answer is obvious. What the laws of Missouri authorized was competent for the Supreme Court of Missouri to decide, and it decided that the order of the board of equalization was legal under the

constitution and statutes of the State. The decision, constituting as it does an interpretation of the constitution and laws of the State, is not open to dispute here. If it were, it would seem incontestable that the State could either prescribe the method or confer upon its taxing officers the power to adopt a suitable one. And there is nothing in the *Adams Express Company cases*, (166 U. S. 171, 226,) to the contrary.

2. The plaintiff in error asserts that the board of equalization practiced discrimination against it by assessing at a value disproportionate to the value assessed on real and personal property by local assessing officers. This defense was expressed as follows:

"Defendant avers that under the law it was the duty of said board of equalization to adjust and equalize as aforesaid the valuation of all real and personal property in the State of Missouri, among the several counties in the State, and that during the period aforesaid it did so proceed to adjust and equalize such valuations. That said State board of equalization, by common arrangement, understanding and purpose among themselves, in fact did during the period aforesaid, in violation of the constitution and laws of said State of Missouri, with intent to compel defendant to pay a greater proportion of taxes than the owners of other real and personal property in said State of Missouri, assess all property, to wit, other than the property of the telegraph companies, to wit, from thirty-five to forty per cent of its true value, whereby as to taxes levied upon real and personal property other than telegraph property in the State of Missouri, this defendant was unlawfully and wrongfully discriminated against to the extent of sixty per cent of the amount of taxes assessed by said State board of equalization and levied by the taxing officers of the State upon defendant in pursuance of such assessment."

Testimony was introduced to sustain the averments.

The Supreme Court of Missouri held, however, that plaintiff in error could not, even under the cases cited by it, avail itself of the defense. The court said:

"The defendant cannot avail itself of these cases, for the reasons, 1st, that it seeks to raise the question of discrimination by an defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization; 2d, that such questions can only be raised by a direct attack, in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collection of the excess restrained. This the defendant has not done in this case. It simply alleges a discrimination or excessive tax, and then seeks to defeat the whole assessment without paying or tendering anything, notwithstanding it admits by its answer and its proofs that it has property in this State subject to taxation of the value of $541,472.40. Upon the authority of the cases relied on by it, this cannot be done."

We concur in this view. The proceedings before the board were *quasi* judicial and the order made by it was within its jurisdiction. It was not void on its face, and cannot be resisted in an action at law. This is the principle announced in the case referred to. In *Stanley* v. *Supervisors of*

Albany is cited, among other cases, *Balfour* v. *City of Portland*, (28 Fed. Rep. 738.) The case is especially pertinent. The action was at law for the recovery of taxes paid under protest which had been levied upon property which, it was charged, had been deliberately overvalued. Recovery was denied. The Circuit Court said:

"The property was subject to taxation by the authority and for the purpose alleged. True, the result reached was erroneous, because of the willful disregard in the proceeding of the law requiring uniformity in the valuation of property for taxation within the jurisdiction of the defendant, still the proceeding being *quasi* judicial, and the subject matter within the jurisdiction of the officers who conducted it, the result reached is so far conclusive that the legality of it cannot be questioned in an action at law to recover back the one-half of the tax as illegal."

So this court said in *Stanley* v. *Supervisors:*

"It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board. (*Newman* v. *Supervisors*, 45 N. Y. 676, 687; *Nat'l Bank of Chemung* v. *Elmira*, 53 N. Y. 49, 52; *Bruecher* v. *The Village of Portchester*, 101 N. Y. 240, 244; *Lincoln* v. *Worcester*, 8 Cush. 55, 63; *Hicks* v. *Westport*, 130 Mass. 478; *Balfour* v. *City of Portland*, 28 Fed. Rep. 738.)"

And we think overvaluation of property cannot be a ground of defense at law. In other words, the action of the tax officers, being in the nature of a judgment, must be yielded to until set aside. This can only be done in a direct proceeding. The property owner is in effect a plaintiff, and the condition of relief against the enforcement of the *quasi* judicial order, which he attacks, is a tender of payment of the taxes that he ought to pay. And this condition would still be upon him if he set up overvaluation as an equitable defense to an action brought against him. (*County of Los Angeles* v. *Ballerimo*, 99 Cal. 549, 597.) This certainly would be so in Missouri, under the doctrine expressed by the Supreme Court of the State in the case at bar.

Judgment affirmed.

Mr. Justice Brewer concurs in the result.

True copy.

Test:

Mr. Justice White and Mr. Justice Peckham dissent.

Clerk Supreme Court, U. S.